LEADING CASES

ON

THE LAW OF EVIDENCE

WITH NOTES

BY

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PREFACE.

THE Law of Evidence is almost entirely case-law; yet there is no collection of leading cases on the subject published in this Country. This book is an attempt to supply an apparent want.

The writer's aim has been—

(1) To select from the Reports the leading case on each of the most important points in the Law of Evidence.

(2) To extract the Principle from each case and state it as a headnote thereto.

(3) To state, where necessary and possible, sufficient of the facts to make the point of evidence clear, excluding all other facts as confusing.

(4) To give all the portions of the judgments, in the Judges' own words, having reference to the point of evidence involved, emphasising in heavy type the most important passages, but excluding all other portions of the judgments.

(5) To give a few preliminary notes introducing cases of a class, and a few footnotes explanatory of individual cases, where such appeared necessary.

(6) To provide an unusually full and systematic table of contents, as a summary or analysis of the whole subject.

It is believed that this table of contents, read together with the headnotes, will give a fairly complete outline of the Law of Evidence.

With regard to the facts involved in the cases, in some instances they do not appear in the Reports, the point of Evidence only being stated. In other cases the facts are quite immaterial to the point of Evidence involved, and it has been thought better to omit them, together with such portions of the judgments as refer only to such facts and throw no light upon the point of Evidence.

E. C.

LINCOLN'S INN,
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THE FUNCTIONS OF JUDGE AND JURY.

PRELIMINARY NOTE.

Where a trial is held before a judge and jury, it is of course necessary to distinguish their respective functions. The Judge has the general conduct of the proceedings, deciding questions of law and practice, including those relating to the production and admissibility of evidence. The jury find the facts, thus dealing with the credibility and weight of the evidence.

But it is the duty of the Judge to instruct the jury in the rules of law and practice by which the evidence is to be weighed; for instance, he should advise them not to convict upon the uncorroborated evidence of an accomplice (see *post*, p. 93). And the Judge also, in summing up the case to the jury, generally comments upon the weight of the evidence.

With respect to the duty of the Judge thus to deal with the weight of the evidence, there appears to be some difference of opinion. It is said in *Powell on Evidence*, p. 11, that "in summing up a case to a jury the Judge will, in his discretion, comment or decline to comment, on the weight of evidence. It would appear that the latter course is his strict duty; and that he may be regarded as *functus officio* when he has laid

the real issues, with the evidence that bears upon them, before the jury, and stated the rules of law applicable to the evidence, and the general principles applicable to the case. Practically, however, this rule is not observed inflexibly; and in many cases, which consist in equal and inseparable parts of law and fact, it is found to be impossible to declare the former without revealing opinions as to the latter."

METROPOLITAN RY. CO. v. JACKSON (1877).

L. R. 5 H. L. 45; 40 L. J. C. P. 121; 24 L. T. 815; 20 W. R. 37.

Questions of law are for the Judge, questions of fact for the jury, to determine. Whether there is sufficient evidence to be left to the jury on the matter in issue is a question of law for the Judge; whether such evidence establishes the matter in issue is a question of fact for the jury.

Thus, in an action for damages caused by negligence, it was held that the Judge was to decide whether there was reasonable evidence to be left to the jury of negligence causing the injury, and for the jury to say whether, and how far, such evidence was to be believed.

LORD CAIRNS, L.C. "The Judge has a certain duty to discharge, and the jurors have another and a different duty. **The Judge has to say** whether any facts have been established by evidence from which negligence *may be* reasonably inferred; **the jurors have to say** whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that **these separate functions should be maintained,** and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it

would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

LORD O'HAGAN. "Your Lordships have never held that, when negligence is alleged, any state of facts assumed to bear upon the issue can be made the subject of inference by jurors, although not really connected with the issue before them. The consequences of such a doctrine would be disastrous, and it is of high importance that the authority of the Judge should restrain a latitude of decision which might often in the result be very inconsistent with reason and justice."

LORD BLACKBURN. "I think it has always been considered a **question of law to be determined by the Judge**, subject, of course, to review, **whether there is evidence** which, if it is believed, and the counter-evidence, if any, not believed, would establish the facts in controversy. It is for **the jury to say whether and how far the evidence is to be believed.** And if the facts, as to which evidence is given, are such that from them a farther inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the Judge to determine, subject to review, as a matter of law, whether from those facts that farther inference may legitimately be drawn."

LORD GORDON. "The duty of a Judge in such a case is an exceedingly delicate one, **as the line of division** between what is proper to be submitted to the jury, as necessary to support a charge of negligence in point of law, and what may be submitted to the jury as sufficient to support a charge of negligence in point of fact, **is often a very narrow one.** But I agree . . . that there is in every case **a preliminary question, which is one of law, namely, whether there is any evidence** on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the Judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant."

Note.—The following matters have, among others, been held to be matters of fact for the jury to decide—actual knowledge, real intention, express malice, good faith, reasonable skill, reasonable time, due diligence, negligence, necessaries for infants, and questions of foreign law.

BARTLETT v. SMITH
(1843).

12 L. J. Ex. 287; 7 Jur. 448; 11 M. & W. 483; 63 R. R. 664.

The admissibility of evidence, documentary or otherwise, is a question of law for the Judge; and, if its admissibility depends on certain facts, the Judge should himself adjudicate upon such facts without submitting them to the jury.

It was objected by the defendant at the trial, that a bill of exchange with a foreign stamp could not be read, on the ground that it was drawn in this country. Evidence of that fact was tendered and refused at that stage, but was afterwards received as part of the defendant's case and submitted to the jury. It was held that the Judge ought to have received evidence of the place of drawing, in the first instance, to enable him to decide upon the admissibility of the bill, and that he ought not to have submitted the evidence to the jury.

Lord Abinger, C.B. "**All facts which are necessary to be proved with a view to the reception of evidence are for the consideration of the Judge,** and he is to receive evidence respecting them for his own satisfaction. He might, indeed, if he pleased, ask the opinion of the jury, but still the decision ought to be his own. **A Judge should receive evidence as to** the competency of a witness, or the sufficiency of a stamp, which is good upon the face of it, and ought to determine these questions for himself, instead of submitting them to the jury."

Parke, B. "This is one of the many cases in which a **Judge ought to receive evidence for his own satisfaction,** and ought not to submit it to the jury."

Alderson, B. "Where the admissibility of the evidence is a question for the Judge, the **facts upon which that admissibility depends, are to be determined by him** and not by the jury. If another rule were to prevail, it would always be left to the jury to decide upon the admissibility of evidence."

Note.—Questions of admissibility, which the Judge decides, include such questions as—whether the fact offered in evidence is relevant,

whether the witness is competent, whether a document comes from proper custody or is properly stamped, whether a dying declaration or confession is admissible, and whether secondary evidence is admissible.

MORRELL v. FRITH
(1838).

3 M. & W. 402; 49 R. R. 659.

The construction of a document is a question of law for the Judge; but where extrinsic evidence is required to explain it, as where peculiar terms or expressions are used, such evidence is for the jury.

The question was, whether a certain letter was a sufficient acknowledgment in writing to take the case out of the Statute of Limitation. The Judge was of opinion that it was not sufficient; and, although requested by the plaintiff's counsel to leave the question to the jury, he declined to do so, and directed a nonsuit. On an application for a new trial, it was held that he was right.

LORD ABINGER, C.B. "One case in which the effect of a written document must be left to a jury, is, where it requires parol evidence to explain it, as in the ordinary case of mercantile contracts in which peculiar terms and abbreviations are employed. So also, where a series of letters form part of the evidence in the cause, they must be left, with the rest of it, to the jury. But **where the question arises on the construction of one document only**, without reference to any extrinsic evidence to explain it, it is the safest course to adhere to the rule, that the construction of written documents is **a question of law for the Court.** The intention of the parties is a question for the jury, and, in some cases, in cases of libel for instance, the meaning of the document is part of that intention, and therefore must be submitted to the jury. But where a legal right is to be determined from the construction of a written document which either is unambiguous or of which the ambiguity arises only from the words themselves, that is a question to be decided by the Judge."

PARKE, B. "The construction of a doubtful instrument itself is

not for the jury, although the facts by which it may be explained are."

ALDERSON, B. "Where it is a letter only, and there is no evidence beyond the written instrument itself, the construction of it is for the Court only, and not for the jury. **The case of mercantile documents is altogether different.** There the meaning of the words themselves is in question, being words that are used in a particular and technical sense; it is as if the document were in a foreign language, and the truth or propriety of the translation were in question."

Note.—The question of existence or non-existence of a document would be a question of fact for the jury.

JUDICIAL NOTICE.

PRELIMINARY NOTE.

There are certain matters which are considered too notorious to require proof: such matters are therefore judicially noticed without any evidence. English Law is dealt with in the same way, as, although it may not be so notorious to the public generally, it is taken to be within the knowledge of the Judge.

It is impossible to state completely the matters which the Court will judicially notice. Any matter of such common knowledge that it would be an insult to intelligence to require proof of it would probably be dealt with in this way. Sir James Stephen gives a list of twelve kinds of matters which would be judicially noticed, but it is obviously incomplete, and apparently without either classification or order—even alphabetical (*Dig. Ev.* Art. 58). Mr. Wills, in his admirable little book on Evidence, classifies the matters under the three following heads, which seem to cover well all cases:—

1. Law and Practice of the Courts.
2. Public Acts and Matters connected with the Government of the Country.
3. Matters of Fact of Common and certain Knowledge.

Leading cases are here given under each of these three heads.

STOCKDALE v. HANSARD

(1839).

9 A. & E. 905; 2 P. & D. 1; 3 JUR. 905; 48 R. R. 326.

The Court will judicially notice the Law of England, including the Law and Custom of Parliament, and

the privileges and course of proceedings of each House of Parliament.

LORD DENMAN, C.J. "It is said that the Courts of law must be excluded from all interference with transactions in which the name of privilege has been mentioned, because they have no means of informing themselves what these privileges are. They are well known, it seems, to the two Houses, and to every member of them, so long as he continues a member; but the knowledge is as incommunicable as the privileges to all beyond that pale. It might be presumption to ask how **this knowledge may be obtained,** had not the Attorney-General read to us all he had to urge on the subject **from works accessible to all and familiar to every man of education.** The argument here seems to run in a circle. The Courts cannot be entrusted with any matter connected with privilege, because they know nothing about privilege; and this ignorance must be perpetual, because the law has taken such matters out of their cognisance. . . . Lord Holt in terms denied this presumption of ignorance, and asserted **the right and duty of the Courts to know the law of Parliament, because the law of the land** on which they are bound to decide. Other Judges, without directly asserting the proposition, have constantly acted upon it; and it was distinctly admitted by the Attorney-General in the course of his argument."

PATTESON, J. "It is further said that the Courts of law have no knowledge as to the *lex et consuetudo parliamenti,* and cannot therefore determine any question respecting it. And yet, at the same time, it is said that the *lex et consuetudo parliamenti* are part of the law of the land. And this Court is, in this very case, actually called upon by the defendants to pronounce judgment in their favour, upon the very ground that their act is justified by that very *lex et consuetudo parliamenti,* of which the Court is said to be invincibly ignorant, and to be bound to take the law from a resolution of one branch of the Parliament alone. . . . **There is nothing so mysterious in the law and custom of Parliament,** so far at least as the rest of the community not within its walls are concerned, **that this Court may not acquire a knowledge of it in the same manner as of any other branch of the law.**"

Note.—The law judicially noticed by the English Courts is that of England and Ireland only, not the law of Scotland, nor that of the

Colonies, and, of course, not that of foreign countries (see *post*, p. 10). Scotch law is a fundamentally different system from English law, but Irish law is substantially English law varied to some extent by statute.

The law thus noticed includes both public and (since 1851) private Acts of Parliament, general customs and some local customs of well-known extensive application, such as Gavelkind and Borough-English customs; but, generally, local or particular customs must be proved.

Of course, if the Judge should happen not to bear in mind the particular law in question, he may refer to, or be referred to, authorities in order to direct his attention to the law in question, and to refresh his memory; but this is not "proving" the law.

BRANDAO v. BARNETT

(1846).

3 C. B. 519; 12 C. & F. 787; 69 R. R. 204.

The Court will judicially notice all general customs, such as the custom of Banker's Lien, and other customs of the Law Merchant.

LORD CAMPBELL. "The first question that arises upon this record is, whether judicial notice is to be taken of the general lien of bankers on the securities of their customers in their hands? The Exchequer bills, for which this action is brought, are found to be the property of the plaintiff, and the defendants rest their defence on their second plea, that they were not possessed, etc., relying on the lien claimed for the balance due to them from Edward Burn."

"The usage of trade by which bankers are entitled to a general lien, is not found by the special verdict, and unless we are to take judicial notice of it, the plaintiff is at once entitled to judgment. But, my Lords, I am of opinion that **the general lien of bankers is part of the law merchant, and is to be judicially noticed**—like the negotiability of bills of exchange or the days of grace allowed for their payment. **When a general usage has been judicially ascertained and established, it becomes a part of the law merchant** which Courts of justice are bound to know and recognise. Such has been the invariable understanding and practice in Westminster Hall for a great many years; there is no decision or *dictum* to the contrary, and justice could not be administered if evidence were

required to be given *toties quoties* to support such usages, and issue might be joined upon them in each particular case."

LORD LYNDHURST. "There is no question that, by the law merchant, a banker has a lien for his general balance on securities deposited with him. I consider this as part of the established law of the country, and that the Courts will take judicial notice of it: **it is not necessary that it should be pleaded, nor is it necessary that it should be given in evidence** in this particular instance."

Note.—Care must be taken to distinguish "general" from "particular" customs, the latter not being judicially noticed, but requiring proof on each occasion. See note to previous case.

MOSTYN v. FABRIGAS

(1774).

1 COWPER, 161.

The Court will not judicially notice the Laws of the Colonies or Foreign Countries. They must be proved as matters of fact.

LORD MANSFIELD, C.J. "**The way of knowing foreign laws is, by admitting them to be proved as facts,** and the Court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement, the construction of which depends upon the custom of Paris, witnesses must be received to explain what the custom is; as evidence is received of customs in respect to trade. . . . So in the supreme resort before the King in Council, the Privy Council determines all cases that arise in the plantations, in Gibraltar or Minorca, in Jersey or Guernsey; and they inform themselves, by having the law stated to them."

Note.—Foreign and Colonial Law is one of those matters of "science or art" upon which evidence of opinion may be given by experts. (See *Bristow* v. *Sequeville*, *post*, p. 79).

TAYLOR v. BARCLAY

(1828).

2 SIMONS, 213; 29 R. R. 82.

The Court will judicially notice public matters affecting the government of the country.

The plaintiffs alleged themselves to be the agents of the Government of the "Federal Republic of Central America, which was a sovereign and an independent State, recognised and treated as such by His Majesty the King of these realms." The Judge, after proper enquiry, took judicial notice of the fact that the so-called Republic had not been recognised as an independent Government by the Government of this country.

THE VICE-CHANCELLOR. "In consequence of the arguments in this case, I have had communication with the Foreign Office, and I am authorised to state that the Federal Republic of Central America has not been recognised, as an independent Government, by the Government of this country. It appears to me that, when it is stated in the bill, that this Republic was, and still is, a sovereign and independent State, recognised and treated as such by His Majesty, the King of these realms, it must have been meant that it has been recognised by the Government of this country as an independent State altogether; and, inasmuch as I conceive it is the **duty of the Judge in every Court to take notice of public matters which affect the government of the country,** I conceive that, notwithstanding that there is this averment in the bill, I am bound to take the fact as it really exists, and not as it is averred to be."

"**I must judicially take notice of what is the truth of the fact, notwithstanding the averment on the record,** because nothing is taken to be true except that which is properly pleaded; and I am of opinion that, when you plead that which is historically false, and which the Judges are bound to take notice of as being false, it cannot be said you have properly pleaded, merely because it is averred, in plain terms; and that I must take it just as if there was no such averment on the record."

Note.—With regard to public matters it is said, in *Taylor on Evidence*, p. 19—"The Courts will judicially recognise the political constitution or

frame of their own government; its essential political agents or public officers sharing in its regular administration; and its essential and regular political operations and actions. . . . But they will not recognise private orders made at the Council table, for these are matters of particular concernment; nor, it seems, any orders of Council, even though they regard the Crown and the Government; nor the transactions on the journals of either House of Parliament."

R. v. LUFFE

(1807).

8 East, 193; 9 R. R. 406.

The Court will judicially notice facts which must have happened according to the constant and invariable course of nature; matters of common knowledge.

The question arising as to the legitimacy of a child, and the fact appearing that the husband had not access to the wife until a fortnight before the birth, the Court took judicial notice of the fact that, according to the course of nature, he could not have been the father.

Lord Ellenborough, C.J. "Here, however, in nature, the fact may certainly be known that the husband, who had no access until within a fortnight of his wife's delivery, could not be the actual father of the child. **Where the thing cannot certainly be known, we must call in aid such probable evidence as can be resorted to,** and the intervention of a jury must, in all cases in which it is practicable, be had to decide thereupon; but where the question arises as it does here, and **where it may certainly be known from the invariable course of nature,** as in this case it may, that no birth could be occasioned and produced within those limits of time, **we may venture to lay down the rule plainly** and broadly, without any danger arising from the precedent."

Grose, J. "We go upon the sure ground of **natural impossibility** and good sense."

LE BLANC, J. "Where it can be demonstrated to be **absolutely impossible**, in the course of nature, that the husband could be the father of the child, it does not break in upon the reason of the current of authorities, to say that the issue is illegitimate."

Note.—Other matters judicially noticed as matters of common knowledge are the course of time, the ordinary public fasts and festivals, the dates of legal sittings of the Court, the order of the months, the meaning of ordinary language, weights and measures, etc.

PRESUMPTIONS.

PRELIMINARY NOTE.

Matters presumed by the Court need not be proved.

Presumptions, or conclusions drawn from certain facts, are frequently stated to be of three kinds—(1) Presumptions of fact; (2) Conclusive presumptions of law; (3) Rebuttable presumptions of law. But, for the purposes of the law of evidence, the first two may, with advantage, be disregarded. A practical lawyer, when he speaks of a presumption, always means a rebuttable presumption. Presumptions of fact are nothing but the conclusions which the Court draws from any individual combination of facts in evidence before it, and are obviously as various and uncertain as such combinations of fact may be. It is impossible to classify or draw rules from them. They may be considered as outside the law of evidence altogether. Conclusive presumptions of law may be, with advantage, considered as mere rules of substantive law, and not presumptions at all. For instance, it is said to be a conclusive presumption that a child under seven cannot commit a crime. Is it not more proper to put it, as a rule of substantive law, that a person of such age is incapable of crime?

Sir J. Stephen uses the term in the third sense only. He says "I use the word 'presumption' in the sense of a presumption of law capable of being rebutted. A presumption of fact is simply an argument. A conclusive presumption I describe as conclusive proof" (*Dig. Ev.*, p. 161). And he defines a presumption as "a rule of law that Courts and Judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved" (*Dig. Ev.*, p. 2). This use of the term is undoubtedly the most proper.

Such presumptions or arbitrary conclusions can only be laid down by the law in cases of certain frequent and well-defined combinations of facts, instances of which are here

given. In such cases the Court must draw the defined conclusion unless it is rebutted by other facts. Such other facts really produce a fresh combination of facts, from which the Court may draw its own conclusion.

WILLIAMS v. EAST INDIA CO.
(1802).

3 EAST, 192; 6 R. R. 589.

There is a presumption of innocence, not only in criminal cases, but in all cases where an allegation of criminality is made.

Therefore, where a plaintiff declared that the defendants, who had chartered his ship, put on board dangerous substances without due notice to the captain or any other person concerned in the navigation, it lay upon him to prove even such negative averment, as the law presumed innocence of such a criminal neglect of duty.

LORD ELLENBOROUGH, C.J. "The rule of law is that **where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative,** and throws the burden of proving the contrary, that is, in such case, of proving a negative, on the other side. . . . That the declaration, in imputing to the defendants the having wrongfully put on board a ship, without notice to those concerned in the management of the ship, an article of a highly dangerous combustible nature, imputes to the defendants a criminal negligence, cannot well be questioned. In order to make the putting on board wrongful, the defendants must be conversant of the dangerous quality of the article put on board; and if being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of **delinquency in the persons so concerned in so putting such dangerous articles on board, for which they were criminally liable** and punishable as for a misdemeanour at least."

BANBURY PEERAGE CASE.

(1811).

1 SIM. & ST. 153; 24 R. R. 159.

There is a presumption that a child born during wedlock is legitimate.

SIR JAMES MANSFIELD, C.J., stated the unanimous opinion of the Judges on questions put to them by the House of Lords :—

"That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption."

"That, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child, no evidence can be received except it tend to falsify the proof that such intercourse had taken place."

"That in every case **where a child is born in lawful wedlock**, the husband not being separated from his wife by a sentence of divorce, **sexual intercourse is presumed to have taken place between the husband and wife**, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child."

"That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, **can only be legally resisted by evidence** of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, **that no sexual intercourse did take place between the husband and wife, at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child.** Where the legitimacy of a child, in such a case, is disputed, on the ground that the husband was not the father of such child, **the question to be left to the jury is,** whether the

husband was the father of such child, and the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and the wife at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child."

Note.—The presumption of legitimacy is said to be a very strong one. Formerly indeed, in order to rebut it, it was necessary to show that the husband had been "beyond the four seas," or out of the kingdom during the whole of the material period. This has been relaxed to the extent shown above.

WILSON v. HODGES
(1802).

2 EAST, 312; 6 R. R. 427.

There is a presumption that things once proved to have existed in a certain state continue to exist in such state for a reasonable time. This is particularly applicable to the continuance of life.

LORD ELLENBOROUGH, C.J. "Where the issue is upon the life or death of a person once shown to be living, the proof of the fact lies on the party who asserts the death; for that the presumption is that the party continues alive until the contrary be shown."

Note.—This presumption of continuance is clearly one of the most practical importance. It is frequently quite impossible to prove, for instance, the existence of a certain thing in a certain state or condition at the particular moment in question. It is sufficient with the aid of this presumption, to prove such existence and state at such an earlier time that, according to its nature, it may fairly be presumed to have lasted to the moment in question. It might, for instance, be necessary to prove that a testator was sane on the 1st January, when he made his will. No evidence might be forthcoming as to his sanity on such date, but evidence would be admissible to show that he was sane a year, a month, or a week before such date. But for this presumption, such cases would frequently be incapable of proof.

With regard to the particular application of the presumption in the above case, the continuance of human life, of course much would depend upon the particular circumstances, such as age, health, etc. A young man might be presumed to live longer than an old man. The presumption is of continuance for a reasonable time according to the circumstances. After seven years there may arise the contrary presumption of death under certain circumstances (see next case).

NEPEAN v. DOE
(1837).
2 M. & W. 894; 46 R. R. 789.

There is a presumption that a person who is not heard of for seven years, by those who would be likely to hear of him if living, is dead; but there is no presumption that he died at any particular time.

LORD DENMAN, C.J. "The law presumes that a person shown to be alive at a given time, remains alive until the contrary be shown, for which reason the onus of showing the death of Matthew Knight lay in this case on the plaintiff. **He has shown the death, by proving the absence of Matthew Knight, and his not having been heard of for seven years**, whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive."

"Now, when nothing is heard of a person for seven years, it is obviously **a matter of complete uncertainty at what point of time in those seven years he died**; of all the points of time the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, **it is presumed that his not being heard of has been occasioned by his death**, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he has not been heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time *before* the expiration of the seven years."

"We adopt the doctrine of the Court of King's Bench, that **the presumption of law relates only to the fact of death**, and that the time of death, whenever it is material, must be a subject of distinct proof."

Note.—It is frequently stated that this presumption of death only arises where the person in question "goes abroad," and is not heard of for seven

years. It is true that in the above case the person had gone abroad, but the rule appears to be general, as stated. Indeed, the presumption of death must be stronger where the person has not gone abroad, as he is in such case more likely to be heard of, and the absence of news of him would still more strongly suggest his death.

BERRYMAN v. WISE

(1791).

4 T. R. 366 ; 2 R. R. 413.

There is a presumption that public and official acts and duties have been regularly and properly performed; and that persons acting as public officers have been regularly and properly appointed.

BULLER, J., said that in the case of all peace officers, justices of the peace, constables, etc., it was sufficient to prove that they acted in those characters without producing their appointments. . . . Neither in actions for tithes is it necessary for the incumbent to prove presentation, institution, and induction ; proof that he received the tithes, and acted as the incumbent, is sufficient.

Note.—This presumption, which is of very wide application, is said to be based on principles of public policy, and upon the idea that a person is not likely to be in a position to act as a public officer unless he really were such. There is no such presumption concerning private offices (see *post*, p. 57).

JOHNSON v. BARNES

(1873).

L. R. 8 C. P. 527 ; 42 L. J. C. P. 259 ; 29 L. T. 65.

There is a presumption that rights exercised without interruption for a long time had a legal origin.

Thus, where the Corporation of a Borough had from time immemorial exercised exclusively a right of pasturage over certain lands, it was presumed that the Corporation was legally entitled to an

exclusive right of pasturage over such lands, and not a mere right of common which could not, under the circumstances, have been legal, and this notwithstanding that the right had been described as a right of common in a long series of documents.

KELLY, C.B. "**I think we are bound to presume a legal origin, if such be possible,** in favour of a right which appears, from the facts stated in the case, to have existed for many hundreds of years, **and that the inaccurate description of such a right in a series of conveyances cannot interfere with the presumption** which we should otherwise be entitled to make from the facts with relation to the enjoyment of the right. When we look to these facts, we find that the Corporation of Colchester has in fact exercised a right of pasturing an unlimited number of cattle or sheep on certain lands around the walls of the town during a certain season of the year, except as to any part of the land under cultivation. . . . It seems to me manifest that what the Corporation have exercised from time immemorial is a right which, though frequently spoken of as a right of common, was, in fact, an exclusive right of pasturage."

"Then we come to what has been made one of the most important questions in the case, that is to say, supposing that the right actually exercised has always been in fact a right of exclusive pasturage, and has always been treated and dealt with as such, is the presumption which would naturally arise from the facts destroyed by the effect of a long and numerous series of documents in which the right is spoken of in expressions indicating a right in the nature of a right of common? I do not think we should be justified in giving this effect to the documents, if the result would be to set aside a right which has been so long exercised in fact. . . . It appears to me, therefore, on consideration of the whole of the facts and documents in this case, that **we are bound, in accordance with one of the best established principles of law, to presume a legal origin, if one were possible, in favour of a long and uninterrupted actual enjoyment of a right.**"

Note.—The most noticeable application of this presumption of legal origin occurs in the case of common law prescription. Strictly, a prescriptive right should have existed from "time immemorial," but, when it was shown to have been actually exercised for a considerable number of years, according to circumstances, it was presumed to have existed from time immemorial, and thus to have had a legal origin. Without such presumption it would have been practically impossible to

prove prescriptive rights. The Prescription Act, 1832, now simplifies the matter by laying down definite periods (*e.g.*, twenty years for easements, and forty years for rights of common), for the acquirement of prescriptive rights in most cases.

WING v. ANGRAVE
(1860).

30 L. J. Ch. 65; 8 H. L. C. 183.

There is no presumption arising from age or sex, etc., as to survivorship among persons dying from the same cause, nor is there any presumption that they all died at the same time. The question is one of fact, and if the evidence does not establish the survival of any individual, the law will treat it as a matter incapable of determination.

Thus, where a husband, wife and two children were swept off the deck of a ship by one wave, and there was no evidence that any one of them was seen later than the others, although the husband was a strong man and a good swimmer, and the wife weak and delicate and no swimmer, the Court would not presume that the husband survived the wife.

Lord Campbell, L.C. "According to our law (unlike the *Code Napoleon*, which has been relied on), where two individuals perish from the same calamity, there is no inference of law as to age or sex which was the survivor. **There must be evidence of the fact,** and the *onus probandi* lies on the party who asserts the affirmative. . . . There is no foundation for the supposed doctrine that, where the evidence left it doubtful which of two individuals died first, there is a presumption of law that they died at the same time."

Lord Chelmsford. "**There is no rule of presumption** in our law which would govern this case, and the evidence left the matter in mere conjecture."

Note.—Mr. Best, in his *Law of Evidence*, p. 343, says that this subject is "one which has embarrassed more or less the jurists and lawyers of every country. . . . The civil law and its commentators were considerably occupied with questions of this nature, and seem to have established as a

general principle (subject, however, to exceptions) that, where the parties thus perishing together were parent and child, the latter, if under the age of puberty, was presumed to have died first; but if above that age, the rule was reversed; while in the case of husband and wife, the presumption seems to have been in favour of the survivorship of the husband. The French lawyers also, both ancient and modern, have taken much pains on this subject. All the theories that have been formed respecting it are based on the assumption that the party deemed to have survived was likely from superior strength, to have struggled longer against death than his companion. . . . The English law has judged more wisely; for notwithstanding some questionable *dicta*, the true conclusion from the authorities seems to be, that it recognises no *artificial* presumption in cases of this nature, but leaves the real or supposed superior strength of one of the persons perishing by a common calamity to its natural weight, *i.e.*, as a *circumstance* proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof."

R. v. WILLSHIRE
(1881).

L. R. 6 Q. B. D. 366; 50 L. J. M. C. 57; 44 L. T. 222; 29 W. R. 473; 45 J. P. 375; 14 Cox, C. C. 541.

Where there are conflicting presumptions, they are to be dealt with in the same way as conflicting evidence, i.e., they must be left to the jury.

Thus, in a prosecution for bigamy, it appeared that the prisoner had gone through four marriage ceremonies, with A, B, C and D, in 1864, 1868, 1879 and 1880 respectively. Having been convicted in 1868 of marrying B in the lifetime of A, he was now prosecuted for marrying D in the lifetime of C. In defence, the prisoner gave evidence of the previous conviction, thus proving that A, his real wife, was alive in 1868. The presumption then arose that her life continued to 1879, when the prisoner married C, and that therefore the marriage with C was void, and he had not committed bigamy by marrying D. On the other hand, there was a presumption of innocence as to the marriage with C, consequently a conflicting presumption of the real wife's death. It was held to be a question of fact for the jury whether she was alive or not.

LORD COLERIDGE, C.J. "**This conflict of presumptions was sufficient to raise a question of fact for the jury to determine.** It

was for the jury to decide whether the man told or acted a falsehood for the purpose of marrying in 1879, or whether his real wife was then dead. The learned Common Serjeant did not leave the question to the jury, but, on these conflicting presumptions, held that the burthen of proof was on the prisoner, who, besides showing the existence of the life in 1868, was bound to prove that it continued till 1879. There is no such rule of law. The prisoner was not bound to do more than set up the life in 1868, which would be presumed to continue, and it was then for the prosecution to show by evidence that that presumption was rebutted."

Note.—As to the two presumptions which arose and were in conflict in this case, viz., that of continuance, and that of innocence, see *ante*, pp. 17 and 15.

ESTOPPEL.

PRELIMINARY NOTE.

Matters which a party is estopped from alleging cannot be proved.

An estoppel, says Blackstone, "happens where a man hath done some act or executed some deed which estops or precludes him from averring anything to the contrary" (*Commentaries*, III., 308). Coke's explanation of it is that it is so called "because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth" (*Coke on Littleton*, 352 a); for which reason it is said to be "odious" and to be construed strictly; but the better view appears to be that the reason is "to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false" (*Smith's Leading Cases*, II., 726). Sometimes an estoppel is spoken of as a "conclusive admission," one which cannot be controverted.

Estoppels are generally divided into three kinds: (1) by record; (2) by deed; (3) by conduct (or *in pais*). The following cases illustrate each kind.

THE DUCHESS OF KINGSTON'S CASE (1776).

20 HOWELL'S STATE TRIALS, 355, 537.

A person who was a party to legal proceedings in which judgment was given, or who claims under a person who was a party thereto, is estopped from denying the facts upon which such judgment was based.

But a judgment does not thus estop persons who were neither parties nor privies thereto.

Any person against whom a judgment is offered in

evidence may prove that it was obtained by fraud or collusion to which he was no party.

The Duchess of Kingston was indicted and tried in the House of Lords for bigamy, in marrying the Duke of Kingston in March, 1769, during the lifetime of her husband the Earl of Bristol. The Duchess pleaded that, in a suit for jactitation of marriage instituted by her against the Earl of Bristol, in the Ecclesiastical Court, namely, in the Consistory Court of the Bishop of London, it had been decreed and declared in February, 1769, that she was a spinster, and that the Earl of Bristol had wickedly and maliciously boasted and publicly asserted (though falsely) that they were joined and contracted together in matrimony; and he was admonished to desist from such boasting and asserting of such alleged marriage.

It was objected that such decree of the Ecclesiastical Court was not binding on the Crown, and did not estop the prosecution from proving that in fact there was a lawful marriage as alleged, at the date of such decree, on the grounds: (1) that the Crown was not a party to the proceedings in the Ecclesiastical Courts, and (2) that the decree was obtained by fraud or collusion of the parties to such proceedings.

It was ordered by the Lords that the following questions be put to the Judges, viz.:

1. Whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the Crown from proving the said marriage in an indictment for polygamy?

2. Whether, admitting such sentence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

Sir William De Grey, C.J. "As a general principle, **a transaction between two parties, in judicial proceedings, ought not to be binding upon a third**; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon the facts found, **although evidence against the parties, and**

all claiming under them, are not, in general, to be used to the prejudice of strangers."

"From the variety of cases relative to judgments being given in evidence in civil suits, **these two deductions seem to follow as generally true: first,** that the judgment of a Court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court; **secondly,** that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment."

"Upon the subject of marriage, the Spiritual Court has the sole and exclusive cognisance of questioning and deciding, directly, the legality of marriage; and of enforcing, specifically, the rights and obligations respecting persons depending upon it; but the Temporal Courts have the sole cognisance of examining and deciding upon all temporal rights of property; and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction. . . . So that the trial of marriage, either as to legality or fact, was not absolutely and from its nature, an object *alieni fori.*"

"A sentence of nullity and a sentence in affirmation of a marriage have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a real estate. A sentence in a case of jactitation has been received upon a title in ejectment as evidence against a marriage, and, in like manner in personal actions, immediately founded on a supposed marriage. . . . But in all these cases the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence and had acquiesced under it, or claimed under those who were parties and had acquiesced."

"But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under

a different consideration, first, because **the parties are not the same; for the King, in whom the trust of prosecuting public offences is vested,** and which is executed by his immediate orders, or in his name by some prosecutor, **is no party to such proceedings in the Ecclesiastical Court,** and cannot be admitted to defend, examine witnesses, in any manner intervene, or appeal; secondly, such doctrines would tend to give the Spiritual Courts, which are not permitted to exercise any judicial cognisance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs."

"But if a direct sentence upon the identical question in a matrimonial cause should be admitted as evidence, . . . yet a cause of jactitation is of a different nature; it is ranked as a cause of defamation only. . . . The sentence has only a negative and qualified effect, viz., 'that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears'; . . . so that, admitting the sentence in its full extent and import, it only proves that it did not yet appear that they were married, and not that they were not married at all."

"But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, **like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled.**"

"**Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of Courts of justice.** Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal."

"**We are therefore unanimously of opinion:—**

"First, that a sentence in the Spiritual Court against a marriage in a suit of jactitation of marriage is not conclusive evidence so as to stop the counsel for the Crown from proving the marriage in an indictment for polygamy.

"But, secondly, admitting such sentence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence by proving the same to have been obtained by fraud or collusion."

BOWMAN v. TAYLOR
(1834).

4 L. J. K. B. 58; 2 AD. & E. 278; 4 N. & M. 264; 41 R. R. 437.

A person who has executed a deed is estopped from denying its contents.

Such estoppel extends to statements made even in recitals.

A deed, by which the plaintiff granted to the defendant a licence to use certain looms, recited that the plaintiff had invented certain improvements, etc., in power looms, and had obtained letters-patent and had caused a specification to be enrolled. It was held that the defendant was estopped from pleading that the plaintiff was not the inventor, that it was not a new invention, and that no specification had been enrolled.

LORD DENMAN, C.J. "An estoppel operates because it concludeth a man to allege the truth by reason of the assertion of the party that that fact is true. **The doctrine, as laid down by Coke, that a recital doth not conclude, because it is no direct affirmation, is not supported by any authority.** If a party has by his deed directly asserted a specific fact, it is impossible to say that he shall not be precluded from disputing that fact, thus solemnly admitted by him on the face of his deed."

PATTESON, J. "The only authority which seems to press upon us is the authority of Lord Coke, but **there have been many cases in which a party has been estopped from disputing a recital.** But it is said that it will be found in these cases that the recitals are so bound up in and part of the deed as that they are the same as the deed itself. Try the present case by that test. This recital is manifestly so clearly connected with the operative part of the deed as to be essentially part of the deed itself. . . . The current of authorities is clearly in favour of the position, that the defendant in this case is estopped by the recital in the deed."

FREEMAN v. COOKE
(1848).

18 L. J. Ex. 114; 12 Jur. 777; 2 Ex. 654; 6 D. & L. 187; 76 R. R. 711.

A person who, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his position, is estopped from setting up against the latter a different state of things as existing at the same time.

This is so whatever such person's real intention was, if he so conducted himself that a reasonable man would take the representation to be true and believe that it was meant he should act upon it. Conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect.

But there is no estoppel unless the words or conduct were intended to induce the other person so to act, or were such that a reasonable man would act upon them; although he did as a fact act upon them to his prejudice.

The defendant was sheriff of Yorkshire, and his officer had seized certain goods under a writ of execution against Joseph and Benjamin Broadbent. Evidence was given that the goods belonged to William Broadbent, but that he, expecting an execution against himself, removed them to the house of his father, Joseph Broadbent; then again, anticipating a distress for rent on his father Joseph, he removed them to the house of his brother, Benjamin Broadbent. When the sheriff's officer entered the house of Benjamin, William gave him notice not to seize the goods as they were the property of Benjamin. The officer then produced his writ, which was against Benjamin. Then William said the goods belonged to another brother, and finally that they belonged to himself. The officer seized and sold the goods as the goods of Benjamin. William having become bankrupt, an action was brought by his assignees to recover the

goods in question, and it was contended by the defendant that the statements of William operated as conclusive evidence, or an estoppel, that the property was not his. It was held that it was not so.

PARKE, B. "The only question is whether it be an estoppel. It is contended that it was, upon the authority of the rule laid down in *Pickard* v. *Sears*. That rule is, that 'where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the time.' . . . By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and **if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect**—as, for instance, a retiring partner omitting to inform the customers of the firm, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith of their being authorised."

"**It is not found that the bankrupt intended to induce the officers to seize the goods as those of Benjamin,** and whatever intention he had on his first statement was done away with by an opposite statement before the seizure took place; **nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representations taken all together.** In truth, in most cases to which the doctrine in *Pickard* v. *Sears* is to be applied, the representation is such as to amount to the contract or licence of the party making it. Here there is no pretence for saying it amounted to a licence, and a contract is out of the question."

Note.—The doctrine of estoppel by conduct may be applied to practically all cases in which a person seeks to give evidence in direct conflict with any of his previous deliberate acts or statements.

"The truth is, that the Courts have been, for some time, favourable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered *odius*" (*Smith's Leading Cases*, II., 865).

COOKE v. LOXLEY
(1792).
5 T. R. 4; 2 R. R. 521.

A tenant of land is estopped from disputing the title of the landlord by whom he was let into possession, or whom he has acknowledged by payment of rent.

In an action for use and occupation of land let to the defendant by the predecessor in title of the present plaintiff, to whom the defendant had also paid rent, the defendant offered evidence to the effect that the plaintiff had no title to the land. Lord Kenyon rejected the evidence, and, on an application for a new trial, his decision was upheld.

Lord Kenyon, C.J. "Conforming to the uniform decisions in all the cases upon this subject, I ruled at the trial, and continue to entertain the same opinion, that in an action for use and occupation **it ought not to be permitted to a tenant, who occupies land by the licence of another, to call upon that other to show the title under which he let the land.** This is not a mere technical rule, but is founded in public convenience and policy. And the only question here is whether that rule shall still prevail; if it do, it applies equally strong to the present case as to all others. Here the defendant, who occupied the land, did so by the permission of the plaintiff, and then refused to pay his rent under an idea that he might contest the plaintiff's right; but the plaintiff could not be supposed to come to trial prepared to meet such a defence and to make out his title; such an action as the present does not involve the question of title."

GROSE, J. "It has been said that the rule of not giving in evidence *nil habuit in tenementis* in an action for use and occupation is a technical rule; but, in my opinion, no rule is better founded in justice and policy than this. The general rule is admitted that in such an action as this **the tenant cannot dispute the landlord's title**; and no exception to it has been shown applicable to this case."

Note.—This estoppel of a tenant is one of the most noticeable instances of estoppel by conduct. Similar cases of estoppel are those of bailees, licensees and agents, who cannot deny the title of their bailors, licensors or principals, after having acknowledged them by their dealings.

RELEVANCY.

PRELIMINARY NOTE.

Matters which are irrelevant to the issue cannot be proved.

Evidence may be given of two sets of facts only: (1) of facts in issue; (2) of facts relevant to the facts in issue.

The facts in issue are those which are alleged by one party and denied by the other on the pleadings, in a civil case; or alleged in the indictment and denied by the plea of "not guilty," in a criminal case. There is, therefore, little difficulty in ascertaining the facts in issue.

The relevant facts are all other facts which are in the eye of the law so connected with or related to the facts in issue that they render the latter probable or improbable, or, roughly, throw light upon them. "Relevancy" may indeed be considered as synonymous with "connection," a word which frequently appears in discussions on the subject. Of course both words must be taken in their legal meaning, which is generally restricted. Common sense relevancy is, as a rule, wider than legal relevancy. A Judge might, in ordinary transactions, take one fact as evidence of another, and act upon it himself, when, in Court, he would rule that it was legally irrelevant. The limits of legal relevancy cannot possibly be strictly stated, as the connection between facts varies infinitely in different cases, but the cases here given show some of the chief rules which have been developed.

R. v. PALMER

(1856).

REPORT OF TRIAL OF WILLIAM PALMER; STEPHEN, HIST. OF CR. LAW, III., 389.

Evidence is admissible not only of the facts in issue, but also of other facts which render the facts in issue probable or improbable by reason of their connection

with or relation to them. Facts so connected with the facts in issue are said to be "relevant facts," and they constitute what is known as "circumstantial evidence."

Thus facts which supply a motive for an act, or constitute preparation for it, or show subsequent conduct apparently influenced by the act, are relevant to the question whether such act was done by the person concerning whom such motive, preparation or subsequent conduct is proved.

In this trial for murder, the pecuniary embarrassment of the prisoner, his buying poison and attempting to avoid an inquest, were held to be facts relevant as circumstantial evidence.

LORD CAMPBELL, C.J. (in his charge to the jury). "By the law and practice of some countries it is allowed, to raise a probability that the party accused has committed the offence which he has to answer, to show that he has committed other offences; with a view of showing that he is an immoral man, and not unlikely to commit other offences, whether of the same or of a different nature; but the law of England is different, and, presuming every man to be innocent until his guilt is established, it allows his **guilt to be established only by evidence directly connected with the charge** brought against him."

"But in a case of this kind you **cannot expect that witnesses should be called to state that they saw the deadly poison administered** by the prisoner, or mixed up by the prisoner openly before them. **Circumstantial evidence as to that is all that can be reasonably expected**; and if there are a series of **circumstances leading to the conclusion of guilt**, then, gentlemen, a verdict of guilty may satisfactorily be pronounced. With respect to the alleged motive, **it is of great importance to see whether there was a motive for committing such a crime**, or whether there was not, or whether there was an improbability of its having been committed so strong as not to be overpowered by positive evidence. But, gentlemen, if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know from the experience of criminal Courts that atrocious crimes of this

sort have been committed from very slight motives; not merely from malice or revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties."

"I shall best discharge my duty by beginning with that part of the case that was first opened by the Attorney-General, respecting **the motive that the prisoner may have had for accomplishing the death** of Cook. Now I think that that **arises** out of **certain pecuniary transactions**, the nature of which has been most minutely laid before you. It appears that the prisoner had borrowed large sums of money upon bills of exchange, which he drew, and which purported to be accepted by his mother, a lady, it seems, of considerable wealth. Those acceptances were forgeries. . . . It had been expected by Palmer that he would have been able to meet those bills by the proceeds of a policy of insurance, which had been effected upon the life of his brother Walter . . . ; but the Prince of Wales Insurance Office denied their liability upon that policy and refused to pay. Thence arose a most pressing embarrassment—payments were urgently required, and there was danger unless they were immediately paid that the law would be put in force, and that the system of forgeries which had been so long carried on would in all human probability be detected and brought to light."

"Then, gentlemen, comes the more direct evidence that **the prisoner at the bar, if you believe the witnesses, procured this very poison.** . . . For what purpose was that obtained? . . . You have no account of that poison. What was the intention with which it was purchased, and what was the application of it, you are to infer?"

"Then, gentlemen, it is impossible that you should not **pay attention to the conduct of the prisoner** at the bar, and there are some instances of his conduct which you will say whether they belong to **what might be expected from an innocent or a guilty man.** He was eager to have the body fastened down in the coffin. Then, with regard to the betting-book, there is certainly evidence from which you may infer that he did get possession of the betting-book, that he abstracted it and concealed it. Then, gentlemen, you must not forget his conduct in trying to bribe the postboy to overturn the carriage in which the jar was being conveyed, to be analysed in London, and from which evidence might be obtained of his guilt.

Again, you find him tampering with the postmaster, and procuring from the postmaster the opening of a letter from Dr. Taylor, who had been examining the contents of the jar, to Mr. Gardiner, the attorney employed on the part of Mr. Stevens. And then, gentlemen, you have tampering with the coroner, and trying to induce him to procure a verdict from the coroner's jury which would amount to an acquittal."

Note.—Such facts as motive, preparation, subsequent conduct, opportunity, etc., referring to the circumstances and position of the party whose act is alleged, are the facts which are generally and specially referred to as "circumstantial" evidence. But this term is properly applicable to all evidence other than that of the facts in issue themselves. Evidence of such facts in issue is known as "direct" evidence. All evidence which is admissible merely as being relevant to the facts in issue is strictly "circumstantial" or "indirect."

"On a superficial view, direct and indirect or circumstantial, would appear to be *distinct* species of evidence; whereas, these words denote only the different modes in which those classes of evidentiary facts operate to produce conviction. Circumstantial evidence is of a nature identically the same with direct evidence; the distinction is that by DIRECT EVIDENCE is intended evidence which applies directly to the fact which forms the subject of inquiry, the *factum probandum;* CIRCUMSTANTIAL EVIDENCE is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts incidental to or usually connected with some other fact as its accident, and from which such other fact is therefore inferred. . . . The *evidence* of these facts is *direct;* the facts themselves are *indirect* and *circumstantial*" (*Wills on Circumstantial Evidence*, p. 19).

DOWLING v. DOWLING

(1860).

10 IRISH C. L. R. 236.

Facts shewing the circumstances and position of the parties whose conduct is in question are generally relevant to such conduct.

Circumstantial evidence is admissible not only in the absence of direct evidence, but also in aid of direct evidence.

Thus, the question being whether A. lent money to B.; evidence of the poverty of A. about the time of the alleged loan was held

admissible as tending to disprove it, in support of the defendant's direct evidence that it had not been lent.

PIGOT, C.B. "In my own experience, now of many years, it has been the constant practice of Judges to receive such evidence when offered, whether in a Court of law or a Court of equity, upon the question whether or not money was paid; especially where that question related to transactions of a remote period, to which it was difficult to apply other than circumstantial evidence. In such cases, **proof that a party was in such circumstances** that he *could not*, has been received as evidence that he *did not*, pay the money in question. . . . **Evidence of this nature is plainly admissible; for the simple reason, that it constitutes, or forms part of, circumstantial evidence,** from which the jury are entitled to form their judgment as to the fact of payment and as to the credibility of conflicting testimony."

"Here the evidence that was offered went back a distance of seven years; but the object of showing the plaintiff's circumstances, seven years before, was to prove the position in life out of which he then emerged, and to show, partly by his own statements, on his cross-examination, of his own intervening pursuits, and partly by the evidence of the defendant, that he had not acquired property in the interval; and that at the time when the loan was alleged to have been made he had not the means of making it."

"**The circumstances of the parties, and the position in which they stood when the matter the subject of controversy occurred, are, for the most part, proper subjects of evidence** to be submitted to a jury; and the recent changes in the law, by which parties are enabled to swear for themselves, have rendered evidence of 'surrounding circumstances' still more important than they were before. They often supply the only means of determining upon testimony at one side directly conflicting with the testimony at the other; and such was the testimony in the case now before us."

Note.—A good deal of discussion has taken place as to the relative weight and reliability of direct and circumstantial evidence. The theory seems to be that the former is superior, as the latter is only a substitute for it. It is said also that there are only two chances of error in the case of direct evidence, namely (1) the mistake, and (2) the untruthfulness of witnesses; while there is a further danger in the case of circumstantial evidence, namely, (3) the fallacious inference of the tribunal. On the

other hand, it is said that circumstantial evidence has the advantage of presenting less opportunities for conspiracy and perjury. Many small unimportant facts are more difficult of fabrication, and less likely to be thought of beforehand, than single important facts nearer to the issue.

"The best writers, ancient and modern," it has been said, "on the subject of evidence, have concurred in treating circumstantial as inferior in cogency and effect to direct evidence. . . . But, in truth, direct and circumstantial evidence ought not to be placed in contrast, since they are not mutually opposed; for evidence of a circumstantial and secondary nature can never be justifiably resorted to, except where evidence of a direct and therefore of a superior nature is unattainable. . . . Where the evidence is direct, and the testimony credible, belief is the immediate and necessary result; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved—frequently of a delicate and perplexing character—liable to numerous causes of fallacy" (*Wills on Circumstantial Evidence*, pp. 35—42).

REX v. ELLIS

(1826).

6 B. & C. 145.

All facts which are parts of the same transaction are relevant to each other, so that, when one of such facts is in issue, the others are admissible.

Such facts as are thus parts of the transaction are generally known as "res gestæ."

Thus, a prisoner being charged with stealing six shillings, marked money, fron a till, evidence was allowed of the taking not only of that amount but also of other moneys taken at the same time.

BAYLEY, J. "I think that it was in the discretion of the Judge to confine the prosecutor to the proof of one felony, or to allow him to give **evidence of other acts, which were all part of one entire transaction.** Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony, by proving him guilty of another unconnected felony; but where **several felonies are connectod together, and form part of one entire transaction, then the one is evidence to show the character of the other.** Now all the evidence in this case tended to show that the prisoner was guilty of the felony charged in the indictment. It went to show the history of the till

from the time when the marked money was put into it up to the time when it was found in the possession of the prisoner."

Note.—This is one of the clearest illustrations of relevancy, the connection between the facts being that they are all parts of the same "transaction." Once establish that they are all parts of the same transaction, then each of such facts is relevant to the others, so that if any of them be in issue the others are admissible as relevant facts. The real, and very substantial, difficulty is to determine the limits of the transaction, and what facts are really part of it.

Stephen defines a "transaction" as "a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of inquiry which may be in issue" (*Dig. Ev.*, Art. 3). It may perhaps be roughly described as any physical act or series of connected physical acts, together with the words accompanying such act or acts (see next case).

THOMPSON v. TREVANION
(1693).
SKINNER, 402.

As a "transaction" consists both of the physical acts and the words accompanying such physical acts, whether spoken by the doer of the physical act or by other persons present, such words are admissible as part of the transaction.

Thus, in a civil action for assault on the plaintiff's wife,

HOLT, C.J., allowed "that what the wife said immediate upon the hurt received, and before that she had time to devise or contrive any thing for her own advantage, might be given in evidence."

Note.—The difficulty is to determine whether the words in question do really accompany the physical acts, or whether they are subsequent to such acts and are therefore mere "narrative" and inadmissible (see the next two cases).

R. v. BEDINGFIELD
(1879).
14 Cox, C. C. 341.

A statement, in order to be admissible in evidence as part of the transaction or "res gestæ," must strictly

accompany, or be made at the same time as, the physical acts.

On a trial for murder, it appeared that the deceased, with her throat cut, came suddenly out of a room, in which she left the prisoner, and that she said something immediately after coming out of the room, shortly before she died. It was held that her statement was not admissible in evidence, either as a dying declaration, as it did not appear that she was in fear of death, or as *res gestæ*, as it was made after the transaction was complete.

COCKBURN, C.J. "**Anything uttered by the deceased at the time the act was being done would be admissible**, as, for instance, if she had been heard to say something, as 'Don't, Harry!' But here it was something stated by her after it was all over, whatever it was, and after the act was completed."

"At the time she made the statement she had no time to consider and reflect that she was dying; there is no evidence to show that she knew it, and I cannot presume it. There is nothing to show that she was under the sense of impending death, so the statement is not admissible as a dying declaration."

Note. — This case has been the subject of much discussion and criticism, and it certainly does not appear consistent with the next case, in which, apparently, a longer time elapsed between the act in question and the spoken words than in the present case. But the cases illustrate the difficulty in determining the limits of the transaction. Cases on such a subject are of little use. Each case must rest on its own facts.

R. v. FOSTER

(1834).

6 C. & P. 325.

A statement may be part of the transaction, and admissible in evidence, although it followed the physical acts, and was indeed the last item of the transaction. It is a question, on the facts, whether it was made substantially at the same time.

The prisoner was charged with manslaughter by driving over deceased. A witness saw the vehicle drive by, but did not see the

accident. He immediately afterwards went up to the deceased, who then made a statement as to the cause of the injury. Such statement was admitted in evidence.

GURNEY, B. "What he said at the instant, as to the cause of the accident is clearly admissible."

PARK, J. "I am of opinion that his evidence ought to be received. It is the best possible testimony that, under the circumstances, can be adduced to show what it was that had knocked the deceased down."

Note.—The very short judgments in this case do not elucidate the matter much. But the facts speak for themselves. The words admitted in evidence as part of the transaction were spoken after the act of driving over the deceased was completed, and after the lapse of at least many seconds. Nevertheless the words were held to be substantially part of the transaction.

RAWSON v. HAIGH

(1824).

2 BING. 99; 9 MOORE, 217; 1 C. & P. 77.

A transaction may be a continuous one, extending over a long period. In such case any words or statements accompanying such continuous transaction, at any time during its continuance, are admissible as part of it.

Thus, where the question was whether a man had absented himself from the realm "with the intent to hinder his creditors," and so brought himself within the Bankruptcy Act, letters written during his absence, indicating such an intention, were admissible in proof thereof.

BEST, C.J. "When these letters are coupled with the fact of his running away in a hurry, would not the jury be warranted in finding that he went to avoid his creditors? If so, there has been a clear act of bankruptcy. But it has been urged, that the second and third letters, having been written subsequently to the act of departing the realm, were not admissible in evidence. I am clear that they were admissible. **The going abroad was of itself an equivocal act,** and

where an act is equivocal, we must get at the motive with which it was committed. In ninety-nine cases out of a hundred, this can only be got at by the declarations of the party himself. . . . **The declarations, in order to be admissible, must be made, or the letters written, at the time of the act in question**; but it is sufficient if they are written at any time during the continuance of the act; **the departing the realm is a continuing act, and these letters were written during its continuance.**"

PARK, J. "I am satisfied that declarations made during departure and absence are admissible in evidence to show the motive of the departure. It is impossible to tie down to time the rule as to the declarations; we must judge from all the circumstances of the case; we need not go the length of saying, that a declaration made a month after the fact would of itself be admissible; but if, as in the present case, there are connecting circumstances, it may even at that time, form part of the whole *res gestæ*. . . . **The declarations, however, must be connected with the state of the party's mind at the time,** and in the present instance I think the connection sufficiently clear for the admission of the letters."

Note.—So, if the question were, whether a person who had remained abroad for some years had acquired a domicile in the country of his residence, letters written by him during such residence, showing his intention to remain there permanently, or otherwise, would doubtless, be admissible as part of the transaction.

AVESON v. KINNAIRD
(1805).

6 EAST, 188; 8 R. R. 455.

Statements made by a person respecting the state of his health and bodily feelings at a particular time are admissible as evidence of such state of health and feelings.

Thus, in an action upon a policy of insurance on the life of the plaintiff's wife, the question being whether the statement of the insured's good health, given at the time of effecting the policy, was

false; the Court allowed evidence to be given by a friend to the effect that she had visited deceased at the time, and had been told by her that she was in a bad state of health.

LORD ELLENBOROUGH, C.J. "The question being, what was the state of her own health at a certain period, a witness has been received to relate that which has always been received from patients to explain, her own account of the cause of her being found in bed at an unseasonable hour with the appearance of being ill. She was questioned as to her bodily infirmity. She said it was of some duration, several days. . . . **What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence** upon such inquiries, and must be resorted to from the very nature of the thing. The substance of the whole conversation was that the wife had been ill at least from the 9th of November, when she was examined by the surgeon and certified to be in good health, down to the day when the conversation took place, and those appearances were exhibited to the witness; and in that view I think the evidence unexceptionable. . . . The admission, then, of the evidence in this case is free from any imputation of breaking in upon the confidence subsisting between man and wife; the declaration was upon the subject of her own health at the time, which is a fact of which her own declaration is evidence; and that, too, made unawares before she could contrive any answer for her own advantage and that of her husband."

GROSE, J. "The question in the cause was concerning her state of health at the time of the insurance effected, and in order to ascertain that it became material to inquire what the state of her health was between the time of her first examination by the surgeon and the time when she was seen by the witness who conversed with her. The first question put the witness was, in what situation she found Mrs. Aveson when she called? The answer was, in bed. To that there could be no objection. The next question was, why was she in bed? Now who could possibly give so good an account of that as the party herself? It is not only good evidence, but the best evidence which the nature of the case afforded."

LAWRENCE, J. "As to the general ground of objection to the evidence as hearsay, **it is in every day's experience in actions**

of assault that what a man has said of himself to his surgeon is evidence to show what he suffered by reason of the assault. The wife was found in bed at an unusual time; she complained of illness, and naturally answered her friend's inquiries by describing how long her health had been bad. . . . If what she said to Susannah Lees were not evidence against her husband, then what she said to the surgeon could not be evidence for him; yet the testimony of the surgeon was brought forward by the plaintiff in order to show that the woman was an insurable life at the time."

Note.—Although this decision has been generally considered correct, there seems to have been some difference of opinion as to the right ground of the admissibility of such evidence. It would appear to be but an instance of a statement accompanying a transaction or act, or being part of it, the act of being in a certain state of health, or, as the Judges put it, the act of being in bed at an unusual hour.

R. v. BLAKE
(1844).

13 L. J. M. C. 131; 8 Jur. 667; 6 Q. B. 126; 66 R. R. 311.

Acts and statements by one of several conspirators or joint offenders in the course of the transaction are evidence against the others, as if done or made by them, so far (only) as they were in the execution or furtherance of their common purpose.

Thus, A. and B., servants in the Custom House, were charged with conspiring to pass goods without paying full duty. A. had made false entries in two books; in one book the entries were necessary in order to carry out the fraud, in the other book the entry was not thus necessary, but was for A.'s convenience only. The former were admissible against B., the latter were not.

Lord Denman, C.J. "Upon the first point, the evidence was clearly receivable; it was an entry made in the course of the transaction, which could not have been proved by any other means. With regard to the other piece of evidence . . . full effect might have

been given to the conspiracy without it . . . **It is a mere statement of what this party was doing.** . . . A mere statement made by one conspirator, or an act that he may choose to do, which is not necessary to carry the conspiracy to its end, is not evidence to affect another."

COLERIDGE, J. "**Acts or declarations are not receivable unless they tend to the advancement of the common object.** That assumes the object not to be then completed. If it has been accomplished, the act or statement is not receivable. This was a mere statement as to the share of the plunder."

WRIGHT v. DOE
(1838).

4 BING. N. C. 489; 6 SCOTT, 58; 5 C. & F. 670.

When the act or conduct of any person is in issue, the contents of any documents, such as letters, upon which he has acted, or which qualify, illustrate or explain such act or conduct, are admissible as part of the transaction.

The question being as to the sanity of a deceased testator, Mr. Marsden, his conduct in indorsing, answering, and acting upon letters received by him from third persons would have been admissible; and, such conduct having been proved, the contents of the letters would have been receivable as statements accompanying and explaining it.

But it was held that the mere fact that such letters were written to him was inadmissible as evidence of his sanity, although they were letters which would only be written to a person believed to be sane. Such fact would only show the writer's opinion of his sanity, and such opinion, being thus given out of Court, would be mere "hearsay."

COLERIDGE, J. "I am now brought to the consideration of the third ground taken by the counsel for the defendant below; that these letters are admissible, because they accompany and explain acts done by Mr. Marsden; in other words, that there is evidence with respect to each of these letters that Mr. Marsden had done some act,

which act would in itself be relevant to and admissible upon the point in issue, his competency, and the act itself being admissible, whatever accompanies it and serves to explain its character, is relevant and admissible also. The principle here applied is admitted on all hands to be correct. . . . The only question therefore remaining is one of fact, whether there was any evidence of such act by Mr. Marsden in regard to all or any one of these letters. . . . What is the evidence of these facts? None direct; and every circumstance stated is equally consistent with the assumption of competency or incompetency. . . . The facts then being consistent with either view of the case, he must fail whose duty it is affirmatively to establish either, and who relies on this for proof."

WILLIAMS, J. "I think that all the three letters contained in the bill of exceptions are inadmissible. . . . If upon the back of all or any of these letters, there had been any indorsement in the handwriting of Mr. Marsden, or if any act had been done by him avowedly in consequence of the contents, or any part of them, such letters or letter must of necessity be submitted to the jury with a view to ascertain how far such indorsement contained any material or appropriate comment, or how far the act was consequent upon, or in accordance with, a fair and reasonable interpretation of the contents."

"It was contended that, apart from all agency of Mr. Marsden, or consciousness by him, a letter addressed to him by a person of intelligence and capacity was, in itself, proof of his *status* as to intellect; that, if it furnished evidence of treatment, as it has been called—how he was estimated, and what was the judgment of the writer—it was more than opinion; it was opinion with an overt act attached to it—opinion acted upon; and that to suppose that a man of undoubted understanding should address sensible observations upon any matter of business or pleasure to a known driveller and idiot, is a monstrous absurdity, and an outrage on experience and common sense. . . . I must observe, that with whatever industry and ingenuity the argument may be cloaked and disguised, it is at last resolvable into opinion and opinion only; and that if it be so, it is opinion presented in such a shape as makes it inadmissible for want of the sanction of an oath, under which evidence of opinion is always given."

"Moreover, it is to be observed that it is not the matter or the manner of the party writing or speaking, but that of the party addressed, which is material when the capacity of the latter is in question. Persons may have been found whose malignity or bad taste, or in whatever manner such a character should be described, might attribute to acknowledged infirmity the possession of qualities and attainments to which there was not the slightest pretension."

"**The question then is,** whether Mr. Marsden has in any manner identified himself with—if the expression be allowable—or in other words has by any act, speech or writing, manifested an acquaintance with and knowledge of the contents of all or any of these letters. If he has, such letter or letters must have been improperly rejected, otherwise not. . . . The foundation of my opinion is, that neither competency nor incompetency should be presumed, and that, therefore the burthen was cast upon the defendant below, who tendered this piece of evidence, to give affirmatively some proof that the mind of Mr. Marsden had been exercised upon it, to make it admissible in a case where the only question was the actual state of that mind; and no such proof was given."

PATTESON, J. "If it be conceded, as I think it must, that the mere opinion of a deceased writer as to the competency of another person, not given upon oath, nor under circumstances which afford the parties to be affected by that opinion any means of inquiring into the reason on which it was adopted, or the facts on which it was founded, cannot be held admissible, I am quite at a loss to see how the circumstance of that opinion being contained in a letter addressed to the individual respecting whose competency the inquiry is instituted, can make any difference; **it shows, after all, nothing but the opinion of the writer,** and the sort of treatment which he adopts toward the party; but it does not in the least tend to enable a jury to judge whether that opinion was right, or that treatment proper; it cannot have any weight, unless it be some which is derived from the authority of the writer; and it ought not on that ground to influence, or even to be laid before a jury. **The conduct of the individual whose competency is in dispute, under such treatment by others, is that alone which can enable a jury to judge** as to the propriety of that treatment; and it is that conduct which is in truth the admissible evidence, and not the treatment, which is proper

and necessary to be laid before the jury in order to enable them to understand and appreciate the conduct of the individual, and for that purpose only."

"Every act of the party's life is relevant to the issue; of course, therefore, any thing which he can be shown to have done in regard to any written document, being evidence, it follows that such written document must itself be received; otherwise the true character of the act which he has done in regard to it cannot be properly estimated, or the jury be enabled to judge how far that act is indicative of the state of his mind or not. In every case, therefore, the first point to be considered will be whether any act has in truth been done by the party in regard to the document proposed to be given in evidence."

ALDERSON, B. "These letters were addressed to the testator by persons acquainted with him, and whose opinion as to his capacity, if properly proved, would be received as evidence in the cause."

"But the point to be considered first, is, how that, which is matter of opinion, is to be proved; I conceive that it is to be proved, like any other fact, by evidence on oath, given in open Court. . . . I conceive, therefore, that these letters are not receivable upon this ground."

"But then, lastly, it is said that the letters are receivable as having been acted upon by the testator and as explanatory of his acts; and if that were the case, I should agree in the conclusion."

"**Every act of the testator is evidence, and if these are letters which qualify, or illustrate, or explain any act of his, they are receivable.**"

"But then, the first step to be taken is to show some act of the testator, by clear evidence, for that is the foundation of the whole."

"Here, that step wholly fails; this is an attempt to raise a superstructure which has nothing to support it."

"**If the testator had made an indorsement on any one of them, the contents of the letter would have been receivable.** But why? only for the purpose of showing that the indorsement was a rational act, not for the purpose of showing the opinion of the writer. If an answer to the letter had been sent by him, the letter is in like manner receivable to show the rationality of such answer."

"It is clear that in this case those who propose these letters as evidence, do it only for the purpose of laying the opinion of the

writers before the jury ; a point which I believe all the Judges are unanimous in thinking they are not receivable to prove."

BOSANQUET, J. "The opinions of deceased persons, acquainted with the testator, respecting his sanity, however distinctly expressed, are not receivable in evidence, unless given upon oath in the course of a judicial proceeding. **The letters and acts of such persons from which their opinion may be inferred, cannot amount to more than opinion positively stated, unless they afford occasion to the testator of manifesting his own conduct or deportment respecting them.** Everything spoken to or read by the testator, and every act done in his sight or hearing, may afford an important inference of his capacity or incapacity ; but the acts of individuals to which he is not a party, can lead to no conclusion beyond that of the agent entertaining a certain opinion or conviction of the testator's state of mind. No one of the letters is expressly proved to have been opened by the testator, or in any way recognised by him."

BOLLAND, B. "I take it to be settled, that in order to show the state of mind and understanding of a person whose competency, as in the present case, is brought in question, whatever is said, written, or done by the friends of the party, and of others who may have had transactions with him, is evidence to be submitted to the jury, who are to decide upon such competency, provided what has been so said, written or done, can be proved to have been known to and acted upon by such party."

PARKE, B. "These letters are sufficiently proved to have been written and sent to the house of the deceased by persons now dead, and they indicate the opinion of the writers that the alleged testator was a rational person and capable of doing acts of ordinary business. But it is perfectly clear that in this case an opinion not given upon oath in a judicial inquiry between the parties is no evidence ; for **the question is not what the capacity of the testator was reputed to be, but what it really was** in point of fact ; and though the opinion of a witness upon oath, as to that fact, might be asked, it would only be a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanour of the deceased. Nor is the evidence the more admissible, because the persons writing the letters do not merely express an opinion in writing, but prove their belief of it by acting

upon it to the extent of **sending the letters** and putting them in the course of reaching the person addressed. After all it **is but an expression of opinion vouched by an act.**"

"Besides that, there is another ground, and the only other ground on which these letters are argued to be receivable in evidence, and that is, that there was proof in this case of acts done by the testator in reference to these letters, or at least one of them, which render the contents admissible by way of explanation of those acts. Those acts are the opening of two of the letters, and placing them in the supposed usual repository of the papers of the deceased, and the opening of the third one, and transmitting it to the attorney."

"The answer to this argument is, that there is no direct proof whatever of these acts being done by the testator; and as to indirect proof, to infer that the testator did the acts, is to assume the very fact to be proved."

VAUGHAN, J. "It appears not to be disputed that the letters which are the subject of the present inquiry, considered merely with reference to the expressed opinions of the several writers, are inadmissible in evidence. They are not sanctioned by the solemnity of an oath; they are not subjected to the test of cross-examination; and they are not within the bounds of the great rule of evidence which requires the presence of both these circumstances. Considered therefore as independent evidence in the character of expressed opinions, they are liable to all the objections to which hearsay evidence is exposed."

"But we are called upon to give them greater weight in the character of acts superadded to opinion, or, as it is expressed by counsel, as treatment of the testator by those who knew him."

"Acts performed by strangers, expressive not merely of opinion, but of the strongest conviction, even in cases where such conviction conflicts altogether with the interest of the person entertaining it, the law will not allow to be presented to the minds of jurymen as evidence. **They are merely opinions expressed in different language, in the language of conduct instead of the language of words.**"

"It must be confessed that if any acts on the part of the testator could be proved, either by letter or from other sources, all declarations and writings which tend to explain such acts, may be put in evidence. The principle then upon which alone the letters can claim admission is the following: **That where any facts are proper evidence upon**

an issue, all oral or written declarations which can explain such facts may be received in evidence."

LITTLEDALE, J. "If a party were alive and could be cross-examined, he could be examined as to the ground of his belief of the competency. But letters of this sort are much less likely to express the real sentiments of the writer than if written to a third person, as it is not likely that the writer would in letters to the party himself indicate any thing tending to a doubt of his incapacity."

"In a question of competence, where the party who alleges the competency is bound to prove it, **he must show that the person has done some act upon this manifestation of opinion,** which indicates that he understands the manifestation; if he does so, it is admissible in evidence, and the effect of it will be left to the jury."

TINDAL, C.J. "**The question, therefore, with respect to the admissibility of the three letters comes to this:** Is there any evidence stated to us from which it can be inferred that the contents of these letters, or any of them, were ever perused by the testator, and by that means submitted to the exercise of his understanding and reasoning powers? or, Is there any evidence of his doing any act with reference to them, which may, according to the nature of such act, import the exercise of a larger or smaller extent of reasoning power?"

R. v. LILLYMAN
(1896).

L. R. [1896] 2 Q. B. 167; 65 L. J. M. C. 195; 74 L. T. 730; 44 W. R. 654; 60 J. P. 536.

Statements made after the transaction are generally irrelevant and inadmissible; but, in cases of rape and similar offences, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge, be given

in evidence by the prosecution, not as evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, or as negativing her consent.

Thus, the mistress of the prosecutrix, being a person to whom she would naturally complain, was allowed to state all that the prosecutrix told her, in the absence of the prisoner, very shortly after the commission of the act.

HAWKINS, J. "It is necessary in the first place to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the *res gestæ*, can be admitted. **It clearly is not admissible as evidence of the facts complained of**; those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, **evidence of them ought to be given before evidence of the complaint is admitted.** The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains."

"In every one of the old text-books, proof of complaint is treated as a most material element in the establishment of a charge of rape or other kindred charge. . . . It is too late, therefore, now to make serious objection to the admissibility of evidence of the fact that the complaint was made, provided it was made as speedily after the acts complained of as could reasonably be expected."

"That **the general usage has been substantially to limit the evidence of the complaint to prove that the woman made a complaint** of something done to her, and that she mentioned in connection with it the name of a particular person, cannot be denied; but it is equally true that Judges of great experience have dissented from this limitation, and of those who have adopted the usage, none have ever carefully discussed or satisfactorily expressed the grounds upon which their views have been based. . . . When and for what reason the proof of the complaint was first limited to answers to such questions as whether the prosecutrix made a complaint, whether she mentioned

a name, or whose name she mentioned, I have not been able to discover."

"After very careful consideration we have arrived at the conclusion that **we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made,** and reason and good sense are against our doing so. The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner; **it can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent** with her testimony on oath given in the witness-box. . . . Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint?"

"**Nor can it be that the jury are bound to accept the witness's interpretation of her words as binding upon them without having the whole statement before them,** and without having the power to require it to be disclosed to them, even though they may feel it essential to enable them to form a reliable opinion. . . . In reality, affirmative answers to such stereotyped questions as whether the prosecutrix made a complaint (which is a very leading question) of something done to herself, and whether she mentioned a name, amount to nothing to which any weight ought to be attached; they tend rather to embarrass than to assist a thoughtful jury, for they are consistent either with there having been a complaint or no complaint of the prisoner's conduct. To limit the evidence of the complaint to such questions and answers is to ask the jury to draw important inferences from imperfect materials, perfect materials being at hand, and in the cognisance of the witness in the box."

"It has been sometimes urged that to allow the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury, they would naturally so treat it. But it never could be legally so left, and we think **it is the duty of the Judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts,** or for any other purpose than that we have stated. With such direction

we think the interests of an innocent accused would be more protected than they are under the present usage. For when the whole statement is laid before the jury they are less likely to draw wrong and adverse inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint of any offence committed by the accused."

Note.—It is not easy to say on what ground such evidence of a complaint is admissible. It is stated in the above judgment that it is not part of the *res gestæ*, or the transaction. But it is very near to it. An exclamation made at the time of the act would be part of the transaction, and would be admissible for all purposes, not merely as corroboration. A statement to be admissible as a complaint must be made very shortly after the transaction (see next case).

R. v. OSBORNE

(1905).

L. R. [1905] 1 K. B. 551; 74 L. J. K. B. 311; 92 L. T. 393; 53 W. R. 494; 69 J. P. 189.

Evidence of complaints made in the absence of the accused, after the matter complained of, is only admissible in cases of rape and similar offences.

Such evidence is admissible, whether consent is or is not a material element in the charge.

But the complaint must be shown to have been made at the first opportunity which reasonably offered itself after the commission of the offence.

The fact that the complaint has been made in answer to a question does not of itself render it inadmissible; but it must not have been elicited by questions of a leading and inducing or intimidating character.

The Judge ought to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them as other than corroboration of the prosecutrix's evidence, or of the absence of consent.

On a charge for indecent assault on a girl aged twelve, evidence was given by another girl aged eleven, to the effect that she had left

the prosecutrix with the prisoner shortly before the alleged offence, arranging to return soon. On her way back she met the prosecutrix running home, and said to her, "Why are you going home? Why did you not wait until we came back?" Her answer, incriminating the prisoner, was admitted in evidence as corroboration of her story.

RIDLEY, J. "It was contended for the prisoner that the evidence was inadmissible—first, because the answer made by the girl was not a complaint, but a statement or conversation, having been made in answer to a question; and secondly, because, as Keziah Parkes was under the age of thirteen, her consent was not material to the charge."

"As to the first point. . . . It appears to us that **the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint.** Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible; but **a question such as this,** put by the mother or other person, 'What is the matter?' or, 'Why are you crying?' will not do so. These are natural questions which a person in charge will be likely to put. **On the other hand, if she were asked,** 'Did So-and-So (naming the prisoner) assault you?' 'Did he do this and that to you?' then the result would be different, and the statement ought to be rejected. In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding Judge. **If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible.** If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first."

"Upon the second point it was contended that, although under the decision of *Reg.* v. *Lillyman*, the particulars of a complaint made may in some circumstances be given in evidence on a charge of rape, that ruling does not extend to a charge of criminal knowledge or indecent assault where, as in the present case, consent is not legally material."

"By the judgment in *Reg.* v. *Lillyman* it was decided that the

complaint was admissible, not as evidence of the facts complained of, nor as being a part of the *res gestæ* (which it was not), but 'as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains.' Counsel for the prisoner argued upon this that the reasons so given were one only, and that the 'consistency of the complaint with the story' given by the prosecutrix was material only so far as the latter alleged non-consent. If, however, that argument were sound, the words in question might have been omitted from the sentence, and it would have been sufficient to say that the complaint was admissible only and solely because it negatived consent. We think, however, if it were a question of the meaning of words, that the better construction of the judgment is that, while the Court dealt with the charge in question as involving in fact (though not in law) the question of consent on the part of the prosecutrix, yet the reasons given for admitting the complaint were two—first, that it was consistent with her story in the witness-box; and secondly, that it was inconsistent with consent. . . . **It is not, therefore, because the charge itself involves proof of the absence of consent that the evidence is admissible**; on the contrary, the prosecutrix herself can make it evidence by deposing that she did not consent, when that is no part of the charge. In other words, **whether non-consent be legally a necessary part of the issue, or whether, on the other hand, it is what may be called a collateral issue of fact, the complaint becomes admissible.** But how does non-consent become a collateral issue of fact? The answer must be, in consequence of the story told by the prosecutrix in the witness-box. And the judgment treats the two cases on the same footing. If non-consent be a part of the story told by the prosecutrix, or if it be legally a part of the charge, in each case alike the complaint is admissible. But if that is so, does not the reasoning apply equally to other parts of the story and not merely to the part in which the prosecutrix has denied consent? If not it seems illogical to allow, as the Court did allow, that the whole of the story may be given in evidence. The true result is, we think, that while the decision in *Reg.* v. *Lillyman* is not strictly on all fours with the present case, yet the reasoning which it contains answers the question now raised for decision."

"But, however that may be, it appears to us that, in accordance with principle, **such complaints are admissible, not merely as negativing consent, but because they are consistent with the story of the prosecutrix.** In all ordinary cases, indeed, the principle must be observed which rejects statements made by any one in the prisoner's absence. Charges of this kind form an exceptional class, and in them such statements ought, under the proper safeguards, to be admitted. **Their consistency with the story told is, from the very nature of such cases, of special importance.** Did the woman or girl make a complaint at once? If so, that is consistent with her story. Did she not do so? That is inconsistent. And in either case the matter is important for the jury."

"We are at the same time not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. **It is only to cases of this kind that the authorities on which our judgment rests apply**; and our judgment also is to them restricted. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, **and only when it is made at the first opportunity after the offence which reasonably offers itself.** Within such bounds we think the evidence should be put before the jury; **the Judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroboration** of the complainant's credibility, and, where consent is in issue, of the absence of such consent."

Note.—The above case seems to settle definitely three debated points:—

1. Such evidence is only admissible in cases of rape and similar offences.
2. It is not necessary that consent should be a material element in the charge.
3. The evidence may be admissible although the complaint was made in answer to a question.

HETHERINGTON v. KEMP

(1815).

4 CAMPBELL, 193; 16 R. R. 773.

There is no presumption that the course of business in a private office has the regularity of that in a public

department. But the existence of any course of business, according to which an act in question would have been done, is relevant.

Thus, a question being whether a certain letter was posted, the facts that all letters put in a certain place were in the usual course of business taken to the post, and that such letter was put in that place, although relevant facts, were held insufficient to prove posting.

LORD ELLENBOROUGH, C.J. "You must go further. Some evidence must be given that the letter was taken from the table in the counting-house, and put into the post-office. Had you called the porter, and he had said that although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the table, this might have done; but I cannot hold this general evidence of the course of business in the plaintiff's counting-house to be sufficient."

Note.—As to the presumption of regularity in public offices, etc., see *ante*, p. 19.

ROBERTSON v. FRENCH

(1803).

4 EAST, 130.

Possession of property, real or personal, is evidence of ownership. Ownership or title need not generally be strictly proved by producing documents of title.

In an action on a policy of insurance on a ship and its cargo, evidence of the facts of possession and dealing with such ship as owners, was allowed as evidence of the plaintiffs' ownership, although the title of the plaintiffs actually depended on a deed, *i.e.*, a bill of sale.

LORD ELLENBOROUGH, C.J. "As to the first point made in this case on the part of the defendant, viz., that the ownership alleged was not sufficiently proved; it was proved by the captain in the ordinary way, that the owners by whom, as such, he was appointed

and employed, were the persons in whom the ownership is by the declaration averred to be. And though it afterwards appeared by his answers on cross-examination, that the ownership was derived to those persons under a bill of sale executed by himself as attorney to one Lawrence Williams, the former owner, it did not on that account become necessary for the plaintiffs to produce that bill of sale, or the ship's register, or to give any further proof of such their property; **the mere fact of their possession as owners being sufficient primâ facie evidence of ownership**, without the aid of any documentary proof or title deeds on the subject, until such further evidence should be rendered necessary in support of the *primâ facie* case of ownership which they made, in consequence of the adduction of some contrary proof on the other side."

Note.—The fact of possession is clearly relevant to the fact of ownership, as the former undoubtedly renders the latter probable. The person who possesses and acts as owner is generally the owner.

DOE v. PENFOLD

(1838).

8 C. & P. 536.

Possession of land is "primâ facie" evidence of seisin in fee simple.

In an action of ejectment, the only evidence to show the seisin of a person, in whom title was alleged, was that he was in possession of the whole of the property. This was held sufficient *primâ facie* evidence.

PATTESON, J. "If he was in actual possession, that is evidence that he was seised in fee, unless there be something to show that he had a less estate. I think that if nothing further be shown, it is, at least, some evidence of a seisin in fee."

Note.—This rule that the possessor of land is *primâ facie* owner in fee simple is the basis of the law as to declarations against proprietary interest, as to which see *post*, p. 125.

JONES v. WILLIAMS
(1837).

2 M. & W. 218; 46 R. R. 611.

Acts of possession and enjoyment of land, as cutting timber, repairing hedges, granting leases, etc., may be evidence of ownership, not only of the particular land with reference to which such acts are done, but also of other land so situated or connected by locality that what is true as to the one piece of land is likely to be true of the other piece of land.

Thus, acts showing apparent ownership of a hedge and the bed of a river at one point, were admitted as evidence of ownership thereof at a neighbouring point.

LORD ABINGER, C.B. "The plaintiff was endeavouring to prove that upon both sides of the river—on the same side with the land of the defendant—he had exercised acts of ownership, such as repairing the hedge; and therefore he claimed a right up to the hedge; and then going further, he shows that the hedge continued a visible line of demarcation without any thing occurring to break its continuity—except that a cross hedge ran down to it, dividing the defendant's farm from his neighbour's land on the same side of the river—down to a considerable distance, till it came opposite to the extremity of the plaintiff's land on the other side. From these facts the plaintiff purposes to show that it is all his; and it appears to me that the evidence ought to have been received, in order to rebut the presumption that the middle of the river was to be considered as the boundary between two distinct closes."

PARKE, B. "I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, were admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and consequently the part in dispute, belonged to the plaintiff. **Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment** of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the

alleged trespass may have been committed; **evidence may be given of acts done on other parts, provided there is such a common character of locality** between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did."

DOE d. FLEMING v. FLEMING
(1827).

4 BING. 266; 29 R. R. 562.

Marriage may usually be proved by general reputation, even when such reputation is not supported by other evidence, and although the persons reputed to be married are still alive.

Thus, where the plaintiff sought to recover certain premises as heir-at-law, and the only evidence of the marriage of his parents was the reputation of their having lived together as man and wife, this was held sufficient, although the father was still alive.

PARK, J. "**The general rule is, that reputation is sufficient evidence of marriage,** and a party who seeks to impugn a principle as well established ought, at least, to furnish cases in support of his position. As we have heard none, I see no reason for disturbing the verdict."

BEST, C.J. "The rule has never been doubted. It appeared on the trial that the mother of the plaintiff was **received into society as a respectable woman,** and under such circumstances improper conduct ought not to be presumed."

Note.—**For the exceptions to this rule, see next case.**

MORRIS v. MILLER
(1767).

4 BURROW, 2057; 1 WM. BLACKSTONE, 632.

In proceedings for bigamy, divorce, or damages for adultery, the marriages upon which the proceedings are based cannot be proved by reputation. Strict evidence of such marriages must be given.

Thus, in an action for criminal conversation (damages for adultery), proof of "cohabitation, name, and reception by everybody as wife," was held insufficient.

LORD MANSFIELD, C.J. "We are all clearly of opinion that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage *in fact*; acknowledgment, cohabitation, and reputation are not sufficient to maintain this action."

"**This is a sort of criminal action**; there is no other way of punishing this crime at common law."

"It shall not depend upon the mere reputation of a marriage, which arises from the conduct or declarations of the plaintiff himself."

"**In prosecutions for bigamy, a marriage in fact must be proved.**"

"No inconvenience can happen by this determination; but inconvenience might arise from a contrary determination, which might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action."

Note.—Stephen says, "the facts that they cohabited and were treated by others as man and wife . . . are not sufficient to prove a marriage in a prosecution for bigamy," etc. (*Dig. Ev.*, Art. 53). But this seems to put it too broadly. The marriage and subsequent ceremony upon which the prosecution is based certainly cannot be so proved, but it may be that another marriage becomes material in such prosecution, and such marriage can certainly be proved by reputation, although it is proving a marriage "in a prosecution for bigamy." Thus, in the case of *R.* v. *Wilson*, 3 F. & F. 119, the prisoner pleaded that, when she went through the first ceremony alleged, the man was already married, and, therefore, the ceremony was void, and she had not committed bigamy. This marriage, so alleged by the prisoner, was allowed to be proved by reputation.

HOLLINGHAM v. HEAD

(1858).

27 L. J. C. P. 241; 4 Jur. N. S. 379; 4 C. B. N. S. 388.

Conduct on other occasions is generally irrelevant. The fact that a person has done a certain thing on other occasions is not relevant to the question whether he did it on the occasion in question.

Thus, the question being whether the plaintiff had sold guano to the defendant on certain special terms, the fact that he had sold guano to other persons on such terms was inadmissible in evidence.

Willes, J. "The question is, whether in an action for goods sold and delivered, it is competent for the defendant to show, by way of defence, that the plaintiff has entered into contracts with other persons in a particular form, for the purpose of inducing the jury to come to the conclusion that the contract sued upon was in that particular form, and so to defeat the action; and I am of opinion that it is not competent for the defendant to do so."

"It may be often difficult to decide upon the admissibility of evidence, where it is offered for the purpose of establishing probability, but to be admissible **it must at least afford a reasonable inference as to the principal matter in dispute.** . . . It appears to me that the evidence, which was proposed to be given in this case, would not have shown that it was probable that the plaintiff had made the contract, which the defendant contended he had made; for **I do not see how the fact that a man has once or more in his life acted in a particular way, makes it probable that he so acted on a given occasion.** The admission of such evidence would be fraught with the greatest inconvenience. Where, indeed, the question is one of guilty knowledge or intent, as in the case of uttering forged documents or base coin, such evidence is admissible as tending to establish a necessary ingredient of the crime. But if the evidence were admissible in this case, it would be difficult to say that in any case, where the question was whether or not goods had been sold upon credit, the defendant might not call evidence to prove that other persons had received credit from the plaintiff; or in an

action for an assault, that the plaintiff might not prove that the defendant had assaulted other persons generally, or persons of a particular class."

"To obviate the prejudice, the injustice, and the waste of time to which the admission of such evidence would lead, and bearing in mind the extent to which it might be carried, and that litigants are mortal, it is necessary not only to adhere to the rule, but to lay it down strictly. I think, therefore, **the fact that the plaintiff had entered into contracts of a particular kind with other persons on other occasions could not properly be admitted in evidence, where no custom of trade to make such contracts, and no connection between such and the one in question, was shown to exist.**"

BYLES, J. "As regards the question put to the plaintiff **on cross-examination, it may be that he might have been asked** whether he had not made the same contract with other persons, which the defendant contended he had made with him, for the purpose of testing his memory or his credit. **But such evidence, when offered as part of the defendant's case, was totally inadmissible.** To have admitted it would have been contrary to all principle, and to what has been the universal practice so long as I have known the profession."

WILLIAMS, J. "As to the evidence offered by the defendant, there can be no doubt whatever that that was inadmissible. It would lead to the greatest inconvenience if we were once to relax the rule, which requires the evidence to be confined to the points in issue, by allowing other transactions to be inquired into."

Note.—Care must be taken not to confuse *conduct* on other occasions with *character* (see note, *post*, p. 69).

R. v. GEERING

(1849).

18 L. J. M. C. 215.

When a person is charged with some act involving guilty knowledge or intention, after proof of the physical act, evidence is admissible of his similar acts on

other occasions, in order (only) to show his guilty knowledge or intention.

Thus, the question being whether prisoner murdered her husband by poison; after proof of the actual administering of the poison, evidence could be given that other members of her family, whose food she prepared, died from similar poison, in order to show that such administering was not accidental.

POLLOCK, C.B. "The tendency of such evidence is to prove and **to confirm the proof already given**, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case, I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred is also receivable in evidence, to show that during that time arsenic had been taken by four members of it, with a view **to enable the jury to determine as to whether such taking was accidental or not.** The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony."

Note.—The matter may be roughly stated thus: conduct on other occasions is never admissible to prove the *actus reus*, but is admissible to prove the *mens rea*.

R. v. RHODES

(1899).

L. R. [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774; 19 Cox, C. C. 182.

Evidence of similar acts on other occasions is admissible to prove guilty knowledge or intention, even though such acts were subsequent to the transaction in question, if they show a connected scheme or system of operations.

Thus, on a trial for obtaining eggs by false pretences, it was proved that the prisoner had falsely represented by advertisements that he was carrying on a *bonâ fide* dairyman's business. Evidence was admitted

that, subsequently to the transaction in question, he had obtained eggs from other persons by similar advertisements.

LORD RUSSELL OF KILLOWEN, C.J. "It is plain that the prisoner was carrying on a single and entire scheme of fraud by means of one and the same sham business and sham advertisements. Had the transactions been disconnected and isolated, I should be by no means prepared to admit evidence of the later transactions upon a charge arising out of a former transaction. But here, where, so far from being isolated, **a plain connection between each of these transactions is afforded by the advertisement, which shows that the whole scheme was one entire fraud**, and that the business was an absolute sham, and that the method was the same in every case, and with the one view of defrauding the public, I am of opinion that the **evidence with regard to the prisoner's subsequent transactions was admissible.**"

WILLS, J. "The charge here is that the prisoner falsely pretended he was carrying on a real business when he was carrying on a bogus business. How is this to be shown when a man has, as the prisoner had here, some of the apparatus of a regular business—that is to say, a real shop with his name over it—unless by showing that other like transactions have been carried on by the accused, and that the transaction, the subject of the charge, was part of a system forming a single and entire scheme of fraud? If these other transactions be prior in date to the one in question, there can be no doubt as to their admissibility in evidence. **What difference does it make whether they took place before or after, so long as they would fairly lead to the inference that the transaction on which the charge is based is part of a connected system of operations?** The difficulty here is the interval of time which elapsed; and if there had been no connecting link between the first and last transactions I agree that the evidence of the last transaction would have been inadmissible. . . . But here we find that the same advertisement had been continued, and that its operation in the last case was precisely similar to its operation in the first. This being so, in my judgment the evidence relating to the later transactions was properly left to the jury."

WRIGHT, J. "It was an essential part of the proof that it was a business of a bogus character to show its general nature, and the best

evidence of this would be that it was carried on in the same manner for a considerable time, and **once the continuity of the business was shown, transactions after the date of the alleged particular crime were as relevant** in proof of its general character as transactions before that date."

BRUCE, J. "I cannot say that the evidence is not relevant, because I think it may have tended to show that the prisoner's business was a sham business. It seems to me, however, that it had only a remote bearing upon the case, but that is an objection that relates to the weight of the evidence only, and not to its admissibility."

Note.—It will be observed that the substantial question is—do such acts show a scheme or system of operations of which the act charged forms a part? If so, and one act in the scheme is in issue, the other acts, before or after it, are relevant.

R. v. CARTER
(1884).

L. R. 12 Q. B. D. 522; 53 L. J. M. C. 96; 50 L. T. 432; 32 W. R. 663; 48 J. P. 456; 15 Cox, C. C. 448.

Where a prisoner is charged with receiving or having in his possession stolen property; in order to show that he knew such property to have been stolen, evidence may be given, under 34 & 35 Vict. c. 112, that he had in his possession, at or soon after (but not before) the time when the property the subject of the charge was found, other property stolen within the preceding twelve months.

The prisoner was charged with receiving a mare, knowing it to have been stolen, on the 20th May, 1883; and the question was whether evidence could be admitted under the above statute that another mare was in his possession and sold by him on the 9th May, 1883. It was held that such evidence was inadmissible.

HAWKINS, J. "The prisoner was in possession of the mare first stolen in the month of May, but before the crime the subject-matter

of the present indictment was committed. I cannot think that a case falling within the section relied on; the true construction of the section appears to me to be that of Bramwell, L.J. If you find other stolen property in the possession of the person charged as a receiver at the same time that you find the property with regard to which you are charging him with receiving, you can prove that you did so find such property, if it be property stolen within twelve months preceding. I do not mean to say that you must find the property the subject of the indictment and the property with regard to which you are seeking to give evidence at the same identical moment. It would be enough, I should say, if a police constable after finding one quantity of stolen property took it away with him and then came back to the premises of the accused where he had found the first lot for a further search, and on such search succeeded in finding there more stolen property, stolen within the required period, that is substantially a finding at the same time, but here in the present case there is nothing of the kind."

Note.—This is a statutory extension of the principle that conduct on other occasions is admissible to prove guilty knowledge, etc., introduced in consequence of the great difficulty in proving such knowledge in the case of receiving stolen goods. It allows the mere fact of possession of other stolen goods to be given in evidence, which seems to be something less than the fact of receiving, which would have to be proved under the ordinary rule, as "similar" conduct.

CHARACTER.

PRELIMINARY NOTE.

"Character" has two popular meanings—"disposition" and "reputation." The legal meaning of the term is the latter, at any rate so far as the Law of Evidence is concerned. A man of evil disposition who has secured a good reputation is entitled to the benefit of it in those cases where evidence of his good character is admissible, and *vice versâ*.

Character must be distinguished from conduct on other occasions, with which it is sometimes confused. In order to show system and guilty knowledge, as we have seen, evidence

of specific acts of conduct may be given. But a man, concerning whom such specific acts are proved may still have a good character or reputation, which is not legally affected by evidence of specific acts, as character may be proved by evidence of general reputation only (see *post*, pp. 70 and 72).

The cases in which evidence of character of the parties is admissible may be thus summed up:—

In civil cases:

(1) In actions for defamation, evidence of the plaintiff's character, which is in issue.

(2) In a few cases, such as seduction, evidence of the plaintiff's character, in reduction of damages.

In criminal cases:

(3) In all cases, evidence of the prisoner's character, at his option.

(4) In cases of rape, evidence of the prosecutrix's character.

The following cases illustrate these four points.

As to character of witnesses, see *post*, pp. 203, 210.

ATTORNEY-GENERAL v. BOWMAN

(1791).

2 B. & P. 532.

The character of the parties to a civil action is generally irrelevant.

Upon the trial of an information against the defendant for keeping false weights, and for offering to corrupt an officer, the defendant's counsel called a witness to character. His evidence was not admitted, as it was not a criminal prosecution, but only a penal action.

EYRE, C.B. "**I cannot admit this evidence in a civil suit.** The offence imputed by the information is not in the shape of a crime. It would be contrary to the true line of distinction to admit it, which is this: that **in a direct prosecution for a crime, such evidence is admissible**; but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not."

SCOTT v. SAMPSON
(1882).

L. R. 8 Q. B. 491; 51 L. J. Q. B. 380; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408.

In actions for defamation, evidence of the plaintiff's character may be given, as it is really a matter in issue. But evidence cannot be given of particular acts of misconduct by the plaintiff, nor evidence of rumours to the same effect as the matter complained of.

MATHEW, J. "I have had the advantage of seeing the judgment which my brother Cave is about to deliver, and I agree with him in the conclusions at which he has arrived after a careful examination of the cases."

CAVE, J. "These decisions relate to the admissibility—first, of evidence of reputation; secondly, evidence of rumours of and suspicions to the same effect as the defamatory matter complained of; and, thirdly, evidence of particular facts tending to show the character and disposition of the plaintiff."

"Speaking generally, the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held. **He complains of an injury to his reputation, and seeks to recover damages for that injury, and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation.** 'To deny this would,' as is observed in Starkie on Evidence, 'be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable *quantum* of

injury sustained, **a knowledge of the party's previous character is not only material, but seems to be absolutely essential.**' "

"As to the second head of evidence, or **evidence of rumours and suspicions** to the same effect as the defamatory matter complained of, it would seem that upon principle such evidence **is not admissible, as only indirectly tending to affect the plaintiff's reputation.** If these rumours and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it, they are not relevant to the issue. . . . Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all that those who know him best can say is that they have not heard anything of these rumours. Moreover, it may be that it is the defendant who himself has started them."

"As to the third head, or **evidence of facts and circumstances tending to show the disposition of the plaintiff, both principle and authority seem equally against its admission.** At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation, and to admit evidence of this kind is, in effect, to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of."

Note.—It is obvious that in cases of defamation evidence of the character of the plaintiff must be admitted, the action being brought for injury to such character, which is thus directly in issue, and all matters in issue may undoubtedly be proved. The evidence may show that his character was correctly described, or that it was such that little damage was done to it.

VERRY v. WATKINS

(1836).

7 C. & P. 308.

In a few cases, where the amount of damages depends upon character, as in seduction and breach of promise

of marriage, evidence may be given of the plaintiff's character, but upon the question of damages only.

In an action for seduction, the plaintiff's daughter was cross-examined with the object of showing that she was a girl of loose character. Evidence was also called for the defence showing her general bad character in respect of chastity and moral conduct.

ALDERSON, B. (to the jury). "If you think that the defendant had such intercourse with the daughter of the plaintiff as caused him to be the father of the child to which she gave birth, your verdict must be for the plaintiff; and the case then comes to a **question of damages**; in which view, and in which view alone, you will consider what reliance you ought to place on the evidence adduced on the part of the defendant."

Note.—Stephen says: "In civil cases, the fact that a person's general reputation is bad, may, it seems, be given in evidence in reduction of damages" (*Dig. Ev.*, Art. 57). Stated in this general manner, it would suggest that a person's character could be given in evidence when he claimed damages for a breach of contract or a broken leg. It cannot be so. But in cases of seduction and breach of promise the plaintiff's character for modesty, etc., may clearly be relevant as to the damage suffered.

R. v. ROWTON

(1865).

34 L. J. M. C. 57; 11 L. T. 745; 13 W. R. 436; 11 JUR. N. S. 325; 10 COX, C. C. 25; L. & C. 520.

A prisoner, on his trial, can always give evidence of his good character. The prosecution may rebut such evidence by evidence of his bad character, although they cannot give evidence of his bad character as part of their case.

Evidence of character must not be evidence of particular facts, but must be evidence of general reputation only, having reference to the nature of the charge; not evidence of disposition.

On a trial for indecent assault, where the defendant had given evidence of his good character, a witness called by the prosecution to

rebut such evidence was asked, "What is the defendant's general character for decency and morality of conduct?" The witness said, "I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality." It was held, by eleven Judges against two, that this answer was not admissible in evidence.

COCKBURN, C.J. "Two questions present themselves, the first, whether, **when evidence in favour of the character of the prisoner has been given on his behalf, evidence of his bad character can be adduced upon the part of the prosecution to rebut the evidence so given.** I am clearly of opinion that such evidence may properly be received. It is true that, probably in the experience of all of us, no occasion has presented itself when such evidence has been given on the part of the prosecution. That may be easily explained by the circumstance that it seldom happens that evidence is called to the character of a prisoner when those who represent the prisoner are aware that the character will be liable to be rebutted. Notice is often given from a sense or spirit of fairness by the prosecuting counsel, that if any attempt is made to set up the character of the prisoner, against the facts adduced on the part of the prosecution, such attempt will be met either by a rigorous examination or rebutting evidence; but it seems to me, when we come to consider whether such evidence is admissible, speaking logically and reasonably, it is impossible to come to any other than one conclusion."

"Assuming, then, that evidence was properly received to rebut the prior evidence of good character, adduced by the prisoner, the question still presents itself of whether the answer which was given to the question, which is perfectly legitimate in its character, was an answer which it was proper to leave to the jury? Now, in determining this, it becomes necessary, in the first instance, to consider **what is the meaning of evidence to character.** It is laid down in the books that a prisoner is entitled to give evidence as to his general character. What does that mean? **Does it mean evidence as to his reputation** amongst those to whom his conduct and position are known, **or does it mean evidence of disposition?** I think it means evidence of

reputation only. . . . No one ever heard of a question put deliberately to a witness called on behalf of a prisoner as to the prisoner's disposition of mind ; the way, and **the only way the law allows of your getting at the disposition and tendency of his mind, is by evidence as to his general character founded upon the knowledge of those who know anything about him and his general conduct.** Now, that is the sense in which I find the word 'character' used and applied in all the books of the text-writers of authority upon the subject of evidence."

"No one pretends that, according to the present practice, examination can be made as to a specific fact, though everyone would agree that evidence of one fact of honesty or dishonesty, as the case might be, would weigh infinitely more than the opinions of a man's friends or neighbours as to his general character. The truth is, **this part of our law is an anomaly.** Although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt, as previous good character lays the foundation for the presumption of innocence, yet **the prosecution cannot go into evidence as to the prisoner's bad character.** The allowing evidence of a prisoner's good character to be given has grown up from a desire to administer the law with mercy, as far as possible."

"When we come to consider the question of what, in the strict interpretation of the law, is the limit of such evidence, I must say that, in my judgment, it must be restrained to this: **the evidence must be of the man's general reputation, and not the individual opinion of the witness.** . . . The witness who acknowledged that he knew nothing of the general character, and had no opportunity of knowing it in the sense of reputation, would not be allowed to give an opinion as to a man's character in the more limited sense of his disposition."

"If that be the true doctrine on the subject of the admissibility of evidence to character in favour of the prisoner, the next question that presents itself is, **within what limits must the evidence be confined which is adduced in rebutting** evidence to meet the evidence which the prisoner has brought forward? I think that that evidence **must be of the same character and kept within the same limits**; that while the prisoner can give evidence of general good character, so the evidence called to rebut it must be evidence of the same general

description, showing that the evidence which has been given to establish a good reputation on the one hand is not true, because the man's general reputation was bad."

"Now, then, what is the answer in the present case? **The witness, it seems, disclaims all knowledge as to the general reputation of the accused**; what he says is this: 'I know nothing of the neighbourhood's opinion.' I take the witness in this expression to mean to say, 'I know nothing of the opinion of those with whom the man has in the ordinary occupations of life been brought immediately into contact. I knew him, and so did two brothers of mine when we were at school, and in my opinion his *disposition*' (for in that sense the word "character" is used by the witness)—'in my opinion his disposition is such that he is capable of committing the class of offences with which he stands charged.' I am strongly of opinion that **that answer was not admissible in evidence. . . . I take my stand on this**: I find it uniformly laid down in the books of authority that the evidence to character must be evidence to general character in the sense of *reputation*."

Note.—It is generally stated, that evidence of a prisoner's good character is admissible, but evidence of his bad character is inadmissible, except in answer to evidence of his good character. But why cut up the rule thus into two parts? It seems to be simply this—evidence of the prisoner's character, good or bad, is always admissible at the prisoner's option. Whenever his good character is admissible so is his bad character.

"Evidence of character must, of course, be applicable to the particular nature of the charge; to prove, for instance, that a party has borne a good character for humanity and kindness, can have no bearing in reference to a charge of dishonesty. The correct mode of inquiry is as to the *general* character of the accused" (*Wills on Circumstantial Evidence*, p. 226).

R. v. CLARKE
(1817).

2 STARKIE, 241.

In prosecutions for rape, or assault with intent to commit it, evidence of the bad character of the prosecutrix may be given in defence, her character, under the

circumstances, being considered, to some extent, in issue.

HOLROYD, J. "It is clear that no evidence can be received of particular facts, and such evidence could not have been received, although the prosecutrix had been cross-examined as to those facts, because her answers upon those facts must have been taken as conclusive. With respect to such facts the case is clear. Then, with respect to general evidence; **such evidence, it has been held, is admissible in all cases where character is in issue,** and therefore the only question is, whether the character of the prosecutrix is involved in the present issue. **In the case of an indictment for a rape, evidence that a woman had a bad character previous to the supposed commission of the offence is admissible;** but the defendant cannot go into evidence of particular facts. This is the law upon an indictment for rape, and I am of opinion that the same principles apply to the case of an indictment for an assault with intent to commit a rape."

Note.—This seems to be the only case in which evidence is allowed of the character of the person prosecuting. The act here charged as a crime, is, unlike most other criminal acts, one which may be consented to, and the character of the prosecutrix is material as to consent.

OPINION.

PRELIMINARY NOTE.

As a general rule, the fact that a witness has a certain opinion as to a fact in issue is not relevant to such fact. It is for the Court to form opinions from the relevant facts proved, and it is improper for a witness to express an opinion upon any fact as to which the Court itself can form an opinion.

"Vain would it be for the law to constitute the jury the triers of disputed facts, to reject derivative evidence when original proof is withheld, and to declare that a party is not to be prejudiced by the words or acts of others with whom he is unconnected, if tribunals might be swayed by opinions

relative to those facts, expressed by persons who come before them in the character of witnesses. If the opinions thus offered are founded on no evidence, or on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury, whom the law presumes to be at least as capable as the witnesses of drawing from them any inferences that justice may require" (*Best on Evidence*, p. 424).

But, of course, in those matters in which the Court is not thus as capable as the witnesses of drawing inferences, *i.e.*, in matters which require special study or experience in order that a just opinion may be formed, such as matters of science or art, the rule of exclusion cannot prevail, and the opinions of "experts" must be received.

"The reasonable principle appears to be, that scientific witnesses shall be permitted to testify only to such matters of fact as have come within their own cognisance, or as they have acquired a knowledge of by their reading, and to such inferences from them, or from other facts provisionally assumed to be proved, as their particular studies and pursuits specially qualify them to draw; so that the jury may thus be furnished with the necessary scientific *criteria* for testing the accuracy of their conclusions, and enabled to form their own independent judgment by the application of those *criteria* to the facts established in evidence before them" (*Wills on Circumstantial Evidence*, p. 140).

On questions of identity also, opinion evidence may be given (see *post*, p. 80).

CARTER v. BOEHM

(1766).

3 BURROW, 1905.

A witness may not, generally, give his opinion as to facts in issue or relevant facts. The fact that he has such

an opinion is not relevant to such facts. It is for the Court to form opinions on the facts proved.

In an action on an insurance policy, the question arose as to the materiality of certain facts which had not been communicated to the insurers. It was proposed to give in evidence the opinions of certain insurance brokers, who had had long acquaintance with insurance business. Such evidence was rejected.

LORD MANSFIELD, C.J. "It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness."

FOLKES v. CHADD

(1782).

3 DOUGLAS, 157.

In matters such as those of science or art, upon which the Court itself cannot form an opinion, special study and experience being required for the purpose, expert witnesses may give evidence as to their opinion.

The question arising whether a certain bank, erected for the purpose of preventing the sea overflowing certain meadows, contributed to the choking and decay of a certain harbour, the evidence of Mr. Smeaton, the celebrated engineer, of his opinion on the subject, was allowed.

LORD MANSFIELD, C.J., "The question is, to what has this decay been owing? The defendant says to this bank. Why? Because it prevents the back-water. That is matter of opinion; **the whole case is a question of opinion, from facts agreed upon. Nobody can swear that it was the cause**; nobody thought that it would produce this mischief when the bank was erected."

"Mr. Smeaton is called. A confusion now arises from a misapplication of terms. It is objected that Mr. Smeaton is going to

speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed—the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all these facts, is, that, mathematically speaking, the bank may contribute to the mischief, but not sensibly. **Mr. Smeaton understands the construction of harbours, the causes of their destruction, and how remedied. In matters of science no other witnesses can be called.** . . . I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. **Handwriting is proved every day by opinion**; and for false evidence on such questions a man may be indicted for perjury."

"I have myself received the opinion of Mr. Smeaton respecting mills, as a matter of science. The cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. **Of this, such men as Mr. Smeaton alone can judge.** Therefore, we are of opinion that his judgment, formed on facts, was very proper evidence."

Note.—The matters upon which such opinion evidence can be given, include, *inter alia*, causes of death, insanity, effects of poison, genuineness of works of art, value of articles, genuineness of handwriting, proper navigation of vessels, meaning of trade terms, foreign law, etc.

BRISTOW v. SEQUEVILLE

(1850).

19 L. J. Ex. 289; 14 Jur. 674; 5 Ex. 275; 82 R. R. 664.

It is for the Judge to decide whether the skill of any proposed witness is sufficient to entitle him to be considered as an expert. A person whose knowledge of foreign law is derived solely from study without actual practice is incompetent to give evidence on such matter.

In order to prove the foreign law in force at Cologne, a witness was called, who stated that he was a jurisconsult and adviser to the

Prussian consul in England; that he had studied law at the University of Leipsic, and knew from his studies there that the Code Napoléon was in force at Cologne. Held, that he was incompetent to prove the law of Cologne.

ALDERSON, B. "If a man who has studied law in Saxony, and has never practised in Prussia, is a competent witness, why may not a Frenchman, who has studied the books relating to Chinese law, prove what the law of China is?"

ROLFE, B. "If this is sufficient, it would do to study the German law at Oxford."

Note.—Foreign or Colonial law is a matter of "science," upon which opinion evidence can be given. As to the judicial notice of English law, see *ante*, p. 7.

FRYER v. GATHERCOLE
(1849).

13 JUR. 542.

On questions of identification of persons or things, a witness may speak as to his belief or opinion.

To prove the publication of a libellous pamphlet, a female witness was called, who deposed to having received from the defendant a copy of a pamphlet, of which she read some portions, and lent it to several persons in succession, who returned it to her, after which she wrote her name on it; and, although there was no mark by which she could identify it, she *believed* the copy produced to be the same, but could not swear that it was. It was held that this was proper evidence of identification of the pamphlet.

POLLOCK, C.B. "The question resolves itself into a question of degree. **The witness could say no more than this**: 'I believe the copy of the pamphlet produced to be the same with that which I received from the defendant, because when I lent that copy to other persons it was returned to me, and I had no reason to believe it otherwise when I last got it back. I then for certainty put my name to it.' If the name had been written in the first instance no doubt could have arisen. . . . As has been truly argued, **there are many**

cases of identification where the law would be rendered ridiculous if positive certainty were required from witnesses. . . . The evidence in this case was therefore properly received; any objection to it goes merely to its value."

ALDERSON, B. "She said she read a portion—read several parts of it. She lends it to A. B., he has it in his possession out of her sight, he returns her a similar book on the same subject, and she believes it is the same copy. It is open to contend that A. B. may have substituted another copy, and that that returned is not the same which was lent. The jury may judge how far that is probable or reasonable."

PARKE, B. "In the identification of person you compare in your mind the man you have seen with the man you see at the trial. The same rule belongs to every species of identification."

BURDEN OF PROOF.

PRELIMINARY NOTE

Before the Court can proceed to hear a case, it is, of course, necessary to determine which party shall begin, or upon whom the burden of proof lies. The general rule is that the party who alleges the matter in issue must prove it. In a criminal case the allegations are invariably made by the prosecution, on whom the burden of proof lies, with the exception sometimes as to negative averments, explained in the following pages. In civil cases the pleadings must be looked at in order to settle the question.

The plaintiff naturally, in his Statement of Claim, makes the first allegation. If the defendant, in his Defence, pleads a "traverse," or denial of the plaintiff's allegation, that puts the plaintiff's allegation in issue and leaves the burden of proof upon him. If the defendant pleads a "confession and avoidance," admitting the plaintiff's allegation, but alleging further facts by way of defence, the matter in issue is not the plaintiff's allegation, but that of the defendant, if denied, and the burden of proof is therefore upon the latter.

The expression "right to begin," frequently used in this connection, may seem inconsistent with the expression "burden of proof," referring to the position of the same party. The two expressions both indeed refer to the position of the party who, on the facts, is to begin, but they indicate the different way in which such position may be viewed. If such party has not sufficient evidence to establish his case himself, he would consider his position a burden ; if he has clearly sufficient evidence to make out a *primâ facie* case, he would consider his position a right or privilege, as it would generally entitle him to both the first and the last word in the case.

AMOS v. HUGHES

(1835).

1 M. & ROB. 464.

The burden of proof or right to begin is with the party who alleges the "affirmative in substance" of the matter in issue. The test is, generally, who would be entitled to the verdict if no evidence were given? The burden of proof is on the other party.

In an action for a breach of contract to emboss calico in a workmanlike manner, the defendant pleading that he had done the work properly, the question arose as to which party should begin; it was held that the plaintiff should do so.

ALDERSON, B., said, questions of this kind were not to be decided by simply ascertaining on which side the affirmative, in point of form, lay: **the proper test is, which party would be successful if no evidence at all were given?** Now here, supposing no evidence to be given on either side, the defendant would be entitled to the verdict, for it is not to be assumed that the work was badly executed; therefore the onus lies on the plaintiff.

Note.—It should be observed that the burden of proof is upon, or the right to begin belongs to, the party who alleges the affirmative "in substance." As in the above case, the grammatical affirmative does not settle the question. It is always possible to make an allegation in a negative form, so that the defendant must answer it affirmatively; as above, where the defendant said "he had done the work properly," the plaintiff having alleged, apparently, that it was "not done properly." The proof cannot be shifted by putting an allegation in a negative form. The question is, on the facts, who substantially alleges the "affirmative in substance"? He begins. The next case is perhaps a still better illustration of the rule.

SOWARD v. LEGGATT

(1836).

7 C. & P. 613.

In determining which party ought to begin, it is not so much the grammatical language of the pleading

which is to be considered as the substance and effect of it. The Judge should consider what is the substantial fact in issue, and who alleges the "affirmative in substance" thereof.

The plaintiff, being the landlord of the defendant, alleged that the latter "did not repair" the premises in question. The defendant pleaded that he "did well and sufficiently repair" the same. It was held that, notwithstanding that the defendant's pleading was the grammatical affirmative, the burden of proof was upon the plaintiff.

LORD ABINGER, C.B. "Looking at these things according to common sense, **we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it.** In many cases, a party, by a little difference in the drawing of his pleadings, might make it either affirmative or negative, as he pleased. The plaintiff here says, 'You did not repair'; he might have said, 'You let the house become dilapidated.' I shall endeavour by own view to arrive at the substance of the issue, and I think in the present case that the plaintiff's counsel should begin."

ABRATH v. NORTH EASTERN RY. CO.

(1883).

L. R. 11 Q. B. D. 440; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692.

The burden of proof is upon the party who alleges the matter in issue, even although his allegation involves a negative, as a general rule.

When the party alleging has made out a "primâ facie" case in support of his allegation, the burden of proof may shift to his opponent.

Thus, in an action for malicious prosecution, where the plaintiff alleges that the defendant instituted proceedings against him *without* reasonable and probable cause, the burden is on the plaintiff to show,

primâ facie, the want of reasonable and probable cause. The burden may then shift to the defendant to show that he had such cause.

BRETT, M.R. "It seems to me that the propositions ought to be stated thus: the plaintiff may give *primâ facie* evidence which, unless it be answered either by contradictory evidence, or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff, they must find for the defendant. Then comes this difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff; in that case also the burden of proof lies upon the plaintiff; and if the defendant has been able, by the additional facts which he has adduced, to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him."

BOWEN, L.J. "Whenever litigation exists somebody must go on with it; the plaintiff is the first to begin; if he does nothing he fails; if he makes a *primâ facie* case, and nothing is done to answer it, the defendant fails. **The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given** than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, **the parties from moment to moment may reach points at which the onus of proof shifts**, and at which the tribunal will have to say that if the case stops there it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the

other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. **It is not a rule to enable the jury to decide on the value of conflicting evidence.** So soon as a conflict of evidence arises it ceases to be a question of onus of proof."

"There is another point which must be cleared in order to make plain what I am about to say. **As causes are tried, the term 'onus of proof' may be used in more ways than one.** Sometimes when a cause is tried the jury is left to find generally for either the plaintiff or the defendant, and it is in such a case essential that the Judge should tell the jury on whom the burden of making out the case rests, and when and at what period it shifts. Issues again may be left to the jury upon which they are to find generally for the plaintiff or the defendant, and they ought to be told on whom the burden of proof rests; and indeed it is to be observed that very often the burden of proof will be shifted within the scope of a particular issue by presumptions of law which have to be explained to the jury. But there is another way of conducting a trial at Nisi Prius, which is by asking certain definite questions of the jury. If there is a conflict of evidence as to these questions, it is unnecessary, except for the purpose of making plain what the Judge is doing, to explain to the jury about onus of proof, unless there are presumptions of law, such as, for instance, the presumption of consideration for a bill of exchange, or a presumption of consideration for a deed. And if the jury is asked by the Judge a plain question, as, for instance, whether they believe or disbelieve the principal witness called for the plaintiff, it is unnecessary to explain to them about the onus of proof, because the only answer which they have to give is 'Yes' or 'No,' or else they cannot tell what to say. If the jury cannot make up their minds upon a question of that kind it is for the Judge to say which party is entitled to the verdict. I do not forget that there are canons which are useful to a Judge in commenting upon evidence and rules for determining the weight of conflicting evidence; but they are not the same as onus of proof."

"**Now in an action for malicious prosecution the plaintiff has the burden throughout** of establishing that the circumstances of the

prosecution were such that a Judge can see no reasonable or probable cause for instituting it. **In one sense this is the assertion of a negative,** and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. **If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff.** The terms 'negative' and 'affirmative' are after all relative and not absolute. In dealing with a question of negligence that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively. It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff have not gone the length of contending that in all those cases the onus shifts, and that the person within whose knowledge the truth peculiarly lies is bound to prove or disprove the matter in dispute. I think a proposition of that kind cannot be maintained, and that the exceptions supposed to be found amongst cases relating to the game laws may be explained on special grounds."

"The ground of our decision comes back to what was suggested. Who had to make good their point as to the proposition whether the defendants had taken reasonable and proper care to inform themselves of the true state of the case? **The defendants were not bound to make good anything. It was the plaintiff's duty to show the absence of reasonable care.**

Note.—A negative averment must be distinguished from a contradiction of a positive averment, technically known as a "traverse." The former is part of the allegation which has, generally, to be proved by the party making it. The latter is an answer to the allegation of the opposite party, who must prove his allegation.

R. v. TURNER
(1816).
5 M. & S. 206.

In some cases, if a negative averment is made by one party, and the facts involved are so peculiarly within the knowledge of the other party that it is practically impossible for the party alleging to prove such negative, the burden of proof thereof may be on the party within whose knowledge such facts are, and not upon the party alleging.

So, in a prosecution against a carrier for having pheasants and hares in his possession without being qualified or authorised by law to do so; as there were ten different qualifications recognised by the game laws, and the prisoner knew which qualification, if any, he had, it was held that the burden of proof was upon him to show what qualification he had, notwithstanding that the absence of qualification was affirmatively alleged by the prosecution. Otherwise the prosecution would have been obliged to expressly negative the whole of the ten possible qualifications.

LORD ELLENBOROUGH, C.J. "The question is, upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer, who denies any qualification, to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute, to which the proof may be applied; and, according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that **there would be a moral impossibility of ever convicting upon such an information.** If the informer should establish the negative of any part of these different qualifications that would be insufficient, because it would be said, *non liquet*, but that the defendant may be qualified under the other. And does not, then, common sense show, that **the burden of proof ought to be cast on the person who, by establishing any one of the**

qualifications, will be well defended? Is not the statute of Anne, in effect, a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law; the proof of which is easy on the one side, but almost impossible on the other?"

BAYLEY, J. "I have always understood it to be a general rule, that **if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it,** and not he who avers the negative. And if we consider the reason of the thing in this particular case, we cannot but see that **it is next to impossible that the witness for the prosecution should be prepared to give any evidence of the defendant's want of qualification.** If, indeed, it is to be presumed that he must be acquainted with the defendant, and with his situation or habits in life, then he might give general evidence what those were; but if, as it is more probable, he is unacquainted with any of these matters, how is he to form any judgment whether he is qualified or not, from his appearance only? Therefore, if the law were to require that the witness should depose negatively to these things, it seems to me, that it might lead to the encouragement of much hardihood of swearing. The witness would have to depose to a multitude of facts; he must swear that the defendant has not an estate in his own or his wife's right of a certain value; that he is not the son and heir-apparent of an esquire, etc.; but how is it at all probable that a witness should be likely to depose with truth to such *minutiæ*? On the other hand, **there is no hardship in casting the burden of the affirmative proof on the defendant, because he must be presumed to know his own qualification,** and to be able to prove it. . . . But if the onus of proving the negative is to lie on the other party, it seems to me that it will be the cause of many offenders escaping conviction. I cannot help thinking, therefore, that the onus must lie on the defendant, and that **when the prosecutor has proved everything which, but for the defendant's being qualified, would subject the defendant to the penalty, he has done enough**; and the proof of qualification is to come in as matter of defence."

HOLROYD, J. "It is a general rule, that the affirmative is to be proved, and not the negative, unless under peculiar circumstances,

where the general rule does not apply. Therefore, it must be shown, that this is a case which ought to form an exception to the general rule. Now **all the qualifications mentioned in the statute are peculiarly within the knowledge of the party qualified.** If he be entitled to any such estate as the statute requires, he may prove it by his title deeds, or by receipt of the rents and profits ; or if he is son and heir-apparent, or servant to any lord or lady of a manor appointed to kill game, it will be a defence. All these qualifications are peculiarly within the knowledge of the party himself, whereas **the prosecutor has probably no means whatever of proving a disqualification.**"

Note.—The law on the subject-matter of this case is not free from doubt, and the above case has itself been criticised. It is generally a question of construction of a particular statute. If the negative averment be a simple one, as doing something "without consent of the owner," the burden of proof would undoubtedly be upon the person so alleging, as he could easily satisfy it. But if the averment be complex, as in the above case, it may be held that the burden, after proof of the physical act alleged, is upon the other person. It is much a question of degree.

Some statutes expressly provide that the proof of excuse, authority, absence of fraudulent intent, etc., shall be upon the person charged.

MERCER v. WHALL

(1845).

14 L. J. Q. B. 267 ; 9 Jur. 576 ; 15 Q. B. 878.

In all cases in which a party claims damages, the amount of which is unascertained, he has the right to begin, although the affirmative of the issue on the record rests with the other party.

Lord Denman, C.J. "The natural course would seem to be, that **the plaintiff should bring his own cause of complaint before the Court and jury, in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damage** to which he conceives the proof of such facts may entitle him. . . . It appears expedient that the plaintiff should begin, in order that the Judge, the jury, and the defendant himself, should know precisely how the claim is shaped. This disclosure may

convince the defendant that the defence which he has pleaded cannot be established. . . . If in an action for damages the damages are ascertained, and the plaintiff has a *primâ facie* case on which he must recover that known amount, and no more, unless the defendant proves what he has affirmed in pleading ; here is a satisfactory ground for the defendant's proceeding at once to establish that fact. But if the extent of damage is not ascertained, the plaintiff is the person to ascertain it, and his doing so will have the good effect of making even the defence, in a vast majority of cases, much more easily understood for all who are interested with the decision."

Note.—There is an acknowledged difficulty in cases where the proof of all the issues of a fact is upon the defendant, and that of the amount of damages is upon the plaintiff. Formerly the authorities were conflicting, but the above case seems to have settled the rule as stated.

CORROBORATION.

PRELIMINARY NOTE.

Generally, the evidence of one witness, entirely uncorroborated, is sufficient to establish any fact, if the jury choose to believe it.

In one case the Judges, and in six cases the Legislature, have laid down the rule that there must be corroboration. The only case in which corroboration is required apart from statute is that of perjury, for the obvious reason stated in the leading case.

The cases where corroboration is required by statute are:—

(1) Treason, by 7 & 8 Will. III. c. 3.

(2) Affiliation, by 8 & 9 Vict. c. 10.

(3) Breach of Promise of Marriage, by 32 & 33 Vict. c. 68.

(4) Removal of Paupers, by 39 & 40 Vict. c. 61.

(5) Offences under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69).

(6) Offences under the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41).

It should be specially observed that, of the above cases, the only one in which two witnesses are required is that of Treason, the statute expressly so providing. In all other cases the corroboration may be in other ways, for instance by an admission, even by conduct, of the party implicated. Sir James Stephen (*Dig. Ev.*, Arts. 121, 122) draws the distinction between "corroboration" and "number of witnesses," but puts the case of perjury under the latter head, although showing, by the language used, that it has no place there.

R. v. MUSCOT
(1716).

10 MODERN, 192.

A person cannot legally be convicted of perjury on the uncorroborated evidence of one witness.

HOLT, C.J. "There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent; and therefore a credible and probable witness shall turn the scale in favour of either party; but in the former, presumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it, until disproved. Therefore **to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath.**"

Note.—This is the only case in which the Judges have taken upon themselves to require corroboration without statutory authority.

R. v. STUBBS
(1855).

25 L. J. M. C. 16; DEARS. C. C. 555.

It is a rule of practice that a person shall not be convicted on the uncorroborated evidence of an accomplice.

But corroboration is not legally required, and a conviction obtained on such evidence is valid and cannot be quashed on such ground.

The Judge should advise the jury not to convict on such evidence.

Stubbs and three others were indicted for stealing copper. Three accomplices swore that Stubbs assisted in taking some of the copper and selling it to a marine-store dealer. The latter, being called,

stated that the three other prisoners were the parties who brought the copper and sold it to him. No other evidence was adduced against Stubbs, but the accomplices were corroborated in other particulars with regard to the three other prisoners. The Judge directed the jury that it was not necessary that the accomplices should be confirmed as to each individual prisoner being connected with the crime charged; that their being corroborated as to material facts, tending to show that two of the other prisoners were connected with the larceny, was sufficient as to the whole case, but that the jury should look with more suspicion at the evidence in Stubbs's case, where there was no corroboration, than to the cases of the others, where there was corroboration, but that it was a question for the jury. The jury found all the prisoners guilty, and the Court for Crown Cases Reserved affirmed the conviction, although they regretted it had been arrived at without a warning from the Judge that a conviction should not take place on such evidence.

JERVIS, C.J. "We cannot interfere, though we may regret the result that has been arrived at, for it is contrary to the ordinary practice. **It is not a rule of law that accomplices must be confirmed** in order to render a conviction valid, and it is the duty of the Judge to tell the jury that they may act on the unconfirmed testimony of an accomplice; **but it is usual in practice for the Judge to advise the jury not to convict on such testimony alone**; and juries generally attend to the Judge's direction and require confirmation. But it is **only a rule of practice.** . . . In this case the jury have acted on the evidence, and we cannot interfere."

PARKE, B. "During all the time that I have been on the bench, I have usually laid down the rule as it has been stated by the Chief Justice Jervis. I have told the jury that they may find a prisoner guilty upon the unsupported testimony of an accomplice, but **the Judges have been in the habit of advising them not to act on such testimony unless corroborated.** There has been a difference of opinion among the Judges respecting the corroboration requisite. My practice always has been to tell the jury not to convict the prisoner unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner."

WILLES, J. "**This is not a question of law, but of practice,** and questions of law only can be reserved for our opinion."

Note.—The distinction between corroboration required strictly by law, and that required as a matter of practice or prudence merely, should be specially noted. A conviction on uncorroborated evidence would, in the former case, be illegal, in the latter case, it is perfectly legal, although improper. Sir James Stephen's arrangement (*Dig. Ev.*, Art. 121), where the case of an accomplice is put with the cases where corroboration must be had, and is separated from the case of claims against estates of deceased persons, which stand on the same footing as the case of an accomplice (see next case), is misleading.

BECKETT v. RAMSDALE
(1885).

L. R. 31 C. D. 177; 55 L. J. CH. 241; 54 L. T. 222; 34 W. R. 127.

A claim against the estate of a deceased person is not generally allowed on the uncorroborated evidence of the claimant, although there is no rule of law against allowing it.

SIR J. HANNEN. "It is said on behalf of the defendants that the evidence is not to be accepted by the Court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. **The statement of a living man is not to be disbelieved because there is no corroboration, but we must take into account the necessary absence through death of one of the parties** to the transaction, and in considering the statement of the survivor it is natural to look for corroboration in support of it; but if the evidence given by the living man does bring conviction to the tribunal which has to try the question, then **there is no rule of law which prevents that being acted upon.**"

Note.—"There is in England no rule of law precluding a claimant from recovering against the estate of a deceased person on his own testimony without corroboration; but the Court will always regard such evidence

with jealous suspicion, and, it is said, will in general receive such corroboration, and in Ireland it has been said that there is a positive rule of law admitting of no exception, that a claim upon the assets of a deceased person cannot be allowed on the uncorroborated evidence of the claimant. In Scotland, the general rule is that the testimony of one witness is not full proof of any ground of action or defence whatever" (*Best on Evidence*, p. 519).

MODE OF PROOF.

STOBART v. DRYDEN
(1836).

5 L. J. Ex. 218; 1 M. & W. 615; 2 Gale, 146; 1 Tyr. & Gr. 899; 46 R. R. 424.

Direct evidence, that is evidence of a witness who perceived the facts himself, is generally required.

Hearsay evidence, that is evidence of a witness of facts which he did not perceive with his own senses, but which he heard from other persons, is not admissible, except in a few special cases. This rule excludes statements made by deceased persons generally.

The plaintiff sued the defendant on a mortgage deed. The defendant pleaded that the deed had been fraudulently altered by one of the attesting witnesses, who had since died. In support of this plea, the defendant called a witness to prove statements and letters made and written by the deceased attesting witness, tending to shew that he had fraudulently altered the deed. It was held that the evidence was inadmissible.

Parke, B. "**The general rule is, that hearsay evidence is not admissible as proof of a fact which has been stated by a third person.** This rule has been long established as a fundamental principle of the law of evidence; but certain **exceptions have also been recognised, some from very early times, upon the ground of necessity or convenience.** The simple question for us to decide is, whether such a declaration as this be one of the allowed exceptions to the general rule. . . . Is evidence of what the subscribing witness *has said* admissible?"

"**It was contended** on the argument that it was, and **that it formed an exception** to the general rule, and **on two grounds; one of them**, which I shall mention first, in order to dispose of it, was, that, as the plaintiff used the declaration of the subscribing witness, evidenced by his signature, to prove the execution, the defendant might use any declaration of the same witness to disprove it. The answer to this argument is, that evidence of the handwriting in the

attestation is not used as a declaration by the witness, but to shew the fact that he put his name in that place and manner, in which in the ordinary course of business he would have done, if he had actually seen the deed executed. A statement of the attesting witness by parol, or written on any other document than that offered to be proved, would be inadmissible. The proof of actual attestation of the witness is, therefore, not the proof of a declaration, but of a fact."

"**The other ground, and the principal one,** on which the most reliance was placed, was, **that it was in the nature of a substitute for the loss of the benefit of the cross-examination** of the subscribing witness, if be had been alive and personally examined; by which, either the fact confessed would have been proved; or, if not, the witness would have been liable to be contradicted by proof of his admission: and it was contended that every declaration was admissible which might have been given in evidence to impeach the credit of the witness himself on his personal examination."

"Let us inquire what the authorities are in support of this exception. If we should find them numerous, and of long standing, we should be bound to give effect to them, though we might doubt the policy of introducing such a departure from the established rule: if we find them few, and of comparatively recent origin, and not supported by the deliberate judgment of any Court, we ought not to sanction the introduction of such an exception, especially if its convenience and practical utility be of a doubtful nature." (*Here follows a review of the previous cases.*)

"Such is the state of the authorities, which are very limited indeed in point of number. . . . **it is impossible to say that there is any such weight of authority, however great our respect for the eminent Judges whose names have been mentioned, as to induce us to hold that this case is established and recognised as an exception from the great principle** of our law of evidence, that facts, the truth of which depends on parol evidence, are to be proved by testimony on oath."

"If we had to determine the question of the propriety of admitting the proposed evidence, on the ground of convenience, apart from the consideration of the expediency of abiding by general rules, we should say that it was at the least very doubtful, whether, generally speaking, it would not cause greater mischief than advantage in the

investigation of truth. An extreme case might occur, as there seems to have done before Mr. Justice Heath, where the exclusion of evidence of a death-bed declaration would probably have been the exclusion of one mode of discovering the truth. The same may, perhaps, be said of all solemn assertions *in extremis* by deceased witnesses. But, on the other hand, if any declarations at any time from the mouth of subscribing witnesses who are dead are to be admitted in evidence (and you cannot stop short of that, for no one contends that the exception is to be confined to death-bed declarations, and if so confined, the evidence would be inadmissible in the present case), the result would be that the security of solemn instruments would be much impaired. The rights of parties under wills and deeds would be liable to be affected at remote periods, by loose declarations of attesting witnesses, which those parties would have no opportunity of contradicting, or explaining by the evidence of the witnesses themselves. **The party impeaching the validity of the instrument would, it is true, have an equivalent for the loss of his power of cross-examination of the living witness; but the party supporting it would have none for the loss of his power of re-examination.** We cannot help feeling, therefore, that it is at least very doubtful whether the establishment of such an exception would be productive of any advantage: and when the great benefit to the administration of justice, of abiding by general rules and acting upon general principles, is taken into consideration, we feel no doubt but that **it would be inexpedient to sanction this additional exception to the established rule of evidence."**

Note.—The only case in which evidence may be given of a statement made by a dying person is in a trial for homicide (see *post*, p. 142).

R. v. ERISWELL

(1790).

3 T. R. 707.

Hearsay evidence is not admissible even though it be shown that the statement in question was made on oath.

Thus, the evidence of a witness taken *ex parte* on oath before two magistrates was rejected.

GROSE, J. "Is such evidence competent? It is what is commonly called *hearsay evidence* of a fact. **Now it is a general rule that such evidence is not admissible, except in some few particular cases** where the exception (for aught we know) is as ancient as the rule . . . . No principle was stated to take this out of the general rule, to show why hearsay evidence of the agreement should be permitted in this case any more than any other. But cases have been cited both to prove that this evidence was admissible as hearsay evidence, and as given upon oath before the magistrates . . . . An idea has prevailed that such hearsay evidence is sufficient; but I can make no difference between evidence necessary to prove an hiring, that is, an agreement to hire, and any other agreement . . . . and no one ever conceived that an agreement could be proved by a witness swearing that he heard another say that such an agreement was made."

"Is the evidence better upon the ground that it was upon oath administered by two justices? **Evidence, though upon oath, to affect an absent person, is incompetent, because he cannot cross-examine**; as nothing can be more unjust than that a person should be bound by evidence which he is not permitted to hear."

"But it may be said that it is in this case wise and discreet to depart from the general rule of evidence, and in this instance to admit hearsay evidence of a fact, or evidence on oath administered in the absence of the adverse party. I dread that rules of evidence shall ever depend upon the discretion of Judges; I wish to find the rule laid down, and to abide by it. **In this case I find the general rule; I find no decided authority that forms an exception to it**; and nothing but a clear uncontrovertible decision upon the point; and not the concession of counsel or the *obiter dictum* of a Judge, ought to form an exception to a general rule of law framed in wisdom by our ancestors, and adopted in every case except where the exception is as ancient as the rule."

LORD KENYON, C.J. "**The evidence should be given under the sanction of an oath legally administered and in a judicial proceeding depending between the parties affected by it,** or those who stand in privity of estate or interest with them . . . . Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them, and where each has an opportunity of cross-examining the witness; **otherwise it is** *res inter alios acta*, and not to be received."

HEARSAY: WHEN ADMISSIBLE.

PRELIMINARY NOTE.

It will be observed that the two last cases referred to certain exceptions from the rule that hearsay evidence is not admissible. The law has, indeed, from early times allowed several exceptions, practically in most cases on the ground of necessity, but it has invariably taken care that the exception shall be guarded by some security which makes the evidence really reliable. We shall therefore find generally that there is (1) some special necessity for the admission of such evidence, and (2) some special guarantee of its credibility, to take the place of those incidental to direct evidence, viz., the oath and cross-examination.

Such special necessity for the admission of the hearsay evidence is particularly noticeable in the case of the several instances of admissible statements made by deceased persons, generally called "declarations," hereinafter noticed. If such statements were not admitted, frequently most material evidence, perhaps the only evidence on the subject, would be unavailable, the only persons who could give direct evidence being dead. But it will be noticed that in every case the law is careful to secure some guarantee of credibility, and generally the rules for the admission of such evidence are strictly construed.

The word "declaration" may suggest formality; but really the most informal statements, written or verbal, or even conduct, where it can be understood, are generally admissible, where the circumstances are otherwise proper.

Perhaps the most important instance of admissible hearsay is to be found in the case of "admissions," or statements made by either party to a suit against his interest, as tending either to the proof of his opponent's case or to the disproof of his own. At first sight admissions may not appear to be hearsay, but in reality they are. For instance, a witness for

the plaintiff, who may himself know nothing of the facts, proves that the defendant told him something which is against his case. This is clearly hearsay.

MALTBY v. CHRISTIE

(1795).

1 ESPINASSE, 340.

Statements made by either party to a suit tending to prove his opponent's case or disprove his own are admissible in evidence as admissions. Admissions need not be in writing, or even in express words. They may be gathered from a narrative or descriptive words.

Thus, in an action brought against an auctioneer, to recover the proceeds of sale of goods belonging to A, a bankrupt, the plaintiff (being the assignee of the bankrupt) was allowed to put in evidence, as an admission of the bankruptcy by the defendant, the catalogue of sale issued by him in which he described the goods as "the property of A, a bankrupt."

Note.—It should be observed that admissions are not conclusive, but only evidence, so they can be explained or rebutted by other evidence. Admissions are practically confined to civil cases. In criminal cases, unless the prisoner has admitted the whole charge, either by a confession before trial, or by pleading guilty at the trial, all the facts must generally be proved strictly by other evidence. For the cases on Confessions, see *post*, pp. 110-116.

BESSELA v. STERN

(1877).

L. R. 2 C. P. D. 265; 46 L. J. C. P. 467; 37 L. T. 88; 25 W. R. 561.

Silence may amount to an admission, when it is natural to expect a reply or statement.

Thus, in an action for breach of promise of marriage, it was proved that the plaintiff said to the defendant, "You always promised to

marry me, and you don't keep your word," and the defendant made no answer (beyond saying he would give her money to go away); his silence on the point was held to be an admission.

COCKBURN, C.J. "If that conversation took place, no doubt it is not conclusive; for a man might think it not worth while to contradict the assertion of the promise, and raise a dispute. On the other hand, it might be said he made no reply to the accusation, because he could not with truth deny it."

BRAMWELL, L.J. "If in such a case it would not have been natural to deny it, it is no evidence of an admission that he does not. But, if a denial is what one would naturally expect, it is strong evidence of an admission and must be considered as corroboration of the claim set up."

BRETT, L.J. "The question is, would it have been natural at the time when the woman made the statement, that the man should have contradicted it? If so, the jury had a right to consider his not denying it evidence of the truth of what she said."

Note.—The above case should be compared with the next case. See note thereto.

WIEDEMANN v. WALPOLE
(1891).

L. R. [1891] 2 Q. B. 534; 60 L. J. Q. B. 762; 40 W. R. 114.

When the circumstances are such that a reply cannot properly be expected, the party's silence in face of a charge or assertion will not amount to an admission.

Thus, in an action for breach of promise of marriage, the fact that the defendant had not answered a letter written to him by the plaintiff, calling upon him to perform his promise of marriage, was held not to be any admission by him.

LORD ESHER, M.R. "The letter could only be put in as some evidence of an admission of the truth of the statements contained in it . . . . There are, no doubt, mercantile and business cases in

which it is the ordinary course of mankind to answer a letter written upon a matter of business, and, if the letter were not answered, the Court would take notice of the ordinary course adopted by men of business—namely, to answer a letter where it is not intended to admit the truth of the statements contained in it; and if it were not answered, would take it as some evidence of the truth of the statements in it. **But that is not like the case of a letter charging a man with some offence or impropriety . . . . It is the ordinary and wise practice of mankind not to answer such a letter,** because, if a man answered it, a correspondence would be entered into, and he would be lost. I have no doubt that the mere fact of not answering a letter containing a statement of a promise to marry is not an admission."

BOWEN, L.J. "It would be a monstrous thing if it were the law that the mere fact of a man not answering a letter charging him with some offence, or making some claim against him, would necessarily and in all circumstances be evidence of admission of the truth of the charge or statement contained in the letter. There must be some limit placed upon such a proposition to make it consonant with common sense. **I think the limit to be placed upon it is,** that silence upon the receipt of a letter cannot be taken as evidence of admission of the truth of its contents, unless there are some circumstances in the case which would render it probable that the person receiving the letter, who dissented from the statements, would answer it and deny them."

KAY, L.J. "I decline to lay down any general rule. There are certain business letters, the not answering of which by the persons who received them has been taken to be an admission by those persons of the truth of the statements contained in them. In other cases, **all the circumstances under which the letter was written and received must be looked at** in order to determine whether the omission to reply to it does fairly amount to an admission."

Note.—This case appears to have been much misunderstood; and it has been treated by some text-books as laying down the broad rule that the omission to answer a letter is no admission (see *Best*, p. 336; *Powell*, p. 41; *Stephen*, p. 135). But the case clearly does not lay down so broad a rule. It is plain from the judgments that the whole question depends upon whether it was natural to expect a reply or not. If it were, silence is an admission; if it were not, silence is no admission. In the above case the Court held it was not natural, under the circumstances, to expect

a reply, therefore the silence was no admission. But the Judges all admitted that there might be cases in which silence to a letter would be an admission. The Master of the Rolls appears to have taken a very low view of human nature, when he suggests that a man would more naturally reply to a business letter than repudiate a charge of some offence or impropriety. It is suggested that a man of high character would act otherwise.

MORIARTY v. L. C. & D. RY. CO. (1870).

L. R. 5 Q. B. 314; 39 L. J. Q. B. 109; 22 L. T. 163; 18 W. R. 625.

An admission may be by conduct only; and it may relate not only to specific facts, but even show that the party's whole case is bad.

Thus, where the plaintiff sued a Railway Company for personal injury, evidence was given that he had gone about suborning false witnesses who had not been present at the accident, and it was held that such conduct amounted to an admission that he had no case.

COCKBURN, C.J. "Here, if you can shew that a man has been suborning false testimony, and has endeavoured to have recourse to perjury, it is strong to **shew that he knew perfectly well that his cause of action was an unrighteous one.**"

BLACKBURN, J. "The jury should be cautioned against giving the evidence too much weight, which they might possibly do, and directed that they were not to punish a man for giving false testimony by taking away his right of action, but only to see whether it shook their belief in his evidence."

LUSH, J. "This species of evidence is receivable as an admission by the party that the case he is putting forward is not the true one. **It was an admission by conduct,** and receivable on that ground."

WILLIAMS v. INNES
(1808).

1 CAMPBELL, 364; 10 R. R. 702.

Admissions may be made by agents. Referring one person to another for information may make the latter an agent for the purpose.

LORD ELLENBOROUGH, C.J. "If a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it, as much as if that had been said or done by himself."

KIRKSTALL BREWERY CO. v. FURNESS RY. CO.
(1874).

L. R. 9 Q. B. 468; 43 L. J. Q. B. 142; 30 L. T. 783; 22 W. R. 876.

Whatever an agent does or says in carrying out the business in which he is employed binds his principal. An agent or servant may therefore bind his principal by admissions made in the course of and within the scope of his employment.

In an action against a Railway Company for loss of a parcel of money, statements made by the station-master to a police officer, tending to shew theft thereof by one of the company's servants, were received as admissions against the company, the station-master being the proper agent to make such statements.

COCKBURN, C.J. "I think it impossible to say that a man who has the sole management of a railway station, and had **authority to cause a person to be apprehended** if he had reasonable and probable cause to suppose that a felony had been committed, could not have **authority to give instructions to the police,** and could not make such communications as would be admissible in evidence just as if they were made by his principals."

QUAIN, J. "In putting the police in motion he was **acting within his duty**, and within the scope of the authority given to him."

ARCHIBALD, J. "Being in charge of the station at the time a felony was committed, it was his **duty to put the police in motion.** That being so, I think that he was acting within the scope of his duty, that he had power to bind the company, and therefore that the evidence was admissible."

G. W. RY. CO. v. WILLIS

(1865).

34 L. J. C. P. 195; 18 C. B. (N. S.) 748.

Statements made by servants or agents are not necessarily admissions against the principal, although they would have been admissions if made by the principal himself. Such statements, in order to bind the principal, must have been within the scope of the agent's employment, and made at the time of the transaction in question.

In an action against a Railway Company for not delivering cattle promptly, the plaintiff gave evidence of a conversation a week after the transaction between himself and the company's night inspector, who had charge of the night cattle trains at a certain station, in the course of which the night inspector said the cattle had been forgotten. It was held that this statement was not an admission against the company, as the night inspector was a subordinate servant without authority to make such a statement, and also the statement was made some time after the transaction.

ERLE, C.J. "I am of opinion that this night inspector is not to be presumed to have been authorised by the company to make admissions on their behalf of things gone by."

PETO v. HAGUE
(1804).

5 ESPINASSE, 134.

What an agent says about past transactions conducted for the principal is mere "narrative," and will not bind the principal as an admission. When the agent's right to interfere in the particular matter has ceased, the principal can no longer be affected by his statements any more than by his acts.

LORD ELLENBOROUGH, C.J. "Pelly appeared to be the manager and conductor of the defendant's business; what he might have said **respecting a former sale** made by the defendant, or on another occasion, would not be evidence to affect his master; but what he said **respecting a sale of coals, then about to take place,** and respecting the disposition of the coals then lying at the wharf, which were the object of sale, was **in the course of witness's employment** for the defendant, and was evidence to affect his master."

SWINFEN v. LORD CHELMSFORD
(1860).

29 L. J. EX. 382; 2 L. T. 406; 8 W. R. 545; 6 JUR. (N. S.) 1035; 5 H. & N. 890.

A barrister may make any admission on behalf of his client which, in the honest exercise of his judgment, he thinks proper; but he has no authority on matters collateral to the suit.

POLLOCK, C.B. "The conduct and control of the cause are left necessarily to counsel. If a party desires to retain the power of directing counsel how the suit shall be conducted, he must agree with some counsel willing to bind himself. . . . Although **counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it,** such as withdrawing the record, withdrawing a juror, or calling a witness, or selecting such as in his

discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it."

WOOLWAY v. ROWE
(1834).

3 L. J. K. B. 121; 1 A. & E. 114; 3 N. & M. 849; 40 R. R. 264.

Admissions made by the privies or predecessors in title of the parties may be given in evidence against them.

Thus, the statement of the plaintiff's father, the former owner of the plaintiff's land, that he had not the right claimed by the plaintiff in respect of it, was admissible; although the father was living and in court at the time.

LORD DENMAN, C.J. "The first question raised in this case was, whether the declarations of a person formerly interested in the estate now the plaintiff's were admissible in evidence, when the party himself might have been called. We think they were **receivable, on the ground of identity of interest.** The fact of his being alive at the time of the trial, when perhaps his memory of facts was impaired, and when his interest was not the same, does not, in our opinion, affect the admissibility of those declarations which he formerly made on the subject of his own rights."

SLATTERIE v. POOLEY
(1840).

10 L. J. Ex. 8; 6 M. & W. 664; 1 H. & W. 16; 4 JUR. 1038.

Admissions, being primary evidence against a party, are admissible to prove even the contents of written

documents, without notice to produce, or accounting for absence of originals.

PARKE, B. "**The rule as to the production of the best evidence is not at all infringed.** It does not apply to the present case. That rule is founded on the supposition that a party is going to offer worse evidence than the nature of the case admits. But **what is said by a party to the suit is not open to that objection.** . . . We therefore think it is a sound rule that admissions made by a party to a suit may be received against him, although they relate to the contents of a written document."

Note.—As to the rules concerning the "production of the best evidence," and notices to produce, see *post*, pp. 151 and 156.

CONFESSIONS.

PRELIMINARY NOTE.

Admissions of individual facts are not generally allowed in criminal cases. But the whole charge may be admitted by the prisoner, either by a confession of it before trial or by a plea of "guilty" at the trial. But the law strongly insists that any such confession shall be "free and voluntary," as the following cases show. And even when such a confession is admitted, it is not treated as conclusive. It is open to the prisoner to rebut or explain it.

"With respect to the effect of extra-judicial confessions or statements when received, the rule is clear that, unless otherwise directed by statute, no such confession or statement, whether plenary or not plenary, whether made before a justice of the peace, or other tribunal having only an inquisitorial jurisdiction in the matter, or made by deed, or matter *in pais*, either amounts to an estoppel, or has any conclusive effect against an accused person, or is entitled to any weight beyond that which the jury in their conscience assign to it" (*Best on Evidence*, p. 462).

"Of the credit and effect due to a confessional statement the jury are the sole judges; they must consider the whole confession, together with all the other evidence of the case, and if it is inconsistent, improbable or incredible, or is contradicted or discredited by other evidence, or is the emanation of a weak or excited state of mind, they may exercise their discretion in rejecting it, either wholly or in part, whether the rejected part make for or against the prisoner" (*Wills on Circumstantial Evidence*, p. 100).

R. v. BALDRY

(1852).

2 DENISON, 430.

In criminal cases a confession made by the prisoner can be given in evidence against him, if the prosecution show it was free and voluntary; not otherwise.

It will be held not to be free and voluntary if it were induced by any threat or promise made by a person in authority.

Any expressions suggesting that it would be "better" for the prisoner to tell the truth import a threat or promise.

On the part of the prosecution a police constable was called, whose evidence began thus: "I went to the prisoner's house on the 17th December. I saw the prisoner. Dr. Vincent, and Page, another constable, were with me. I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him." It was held that such words did not amount to any threat or promise to induce the prisoner to confess; that it could have no tendency to induce him to say anything untrue; and that in spite of it if he did afterwards confess the confession must be considered voluntary and admissible.

POLLOCK, C.B. "The ground for not receiving such evidence is that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that it is false or that the law considers such statement cannot be relied upon; but such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury. **A simple caution to the accused to tell the truth if he says anything has been decided not to be sufficient to prevent the statement made being given in evidence**; and although it may be put that when a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what we ought to understand. He is reminded that he need not say anything, but if he says anything let it be true. . . . **But where the admonition to speak the truth has been coupled with any expression importing that it would *be better* for him to do so, it has been held that the confession was not receivable,** the objectionable words being that *it would be better* to speak the truth, because they import that it would be better for him to say something. . . . **The true distinction** between the present case and a case of that kind is, that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not."

"**The question now is, whether the words** employed by the constable, 'he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him,' **amount either to a promise or a threat.** We are not to torture this expression. . . . The words are to be taken in their obvious meaning. . . . It is proper that a prisoner should be cautioned not to criminate himself; but I think that what he says ought to be adduced either as evidence of his guilt, or as evidence in his favour. For these reasons I think that the Lord Chief Justice properly received the confession at the trial."

PARKE, B. "In order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any **inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession.** The decisions to that effect have gone a long way; whether it would not have been better to have allowed the whole to go to the jury, it is now too late to inquire, but I think there has been too much tenderness towards

prisoners in this matter. . . . The rule has been extended quite too far, and justice and common sense have, too frequently, been sacrificed at the shrine of mercy."

ERLE, J. "I am of opinion that when a confession is well proved it is the best evidence that can be produced; and that unless it be clear that there was either a threat or a promise to induce it, it ought not to be excluded."

WILLIAMS, J. "What was said to the prisoner was nothing more than that what he said would not be kept secret, but would be used in evidence; and it is an over-refinement to say that a statement made after such a caution was inadmissible."

LORD CAMPBELL, C.J. "If there be any worldly advantage held out, or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury."

R. v. GOULD

(1840).

9 C. & P. 364.

Notwithstanding that a confession has been obtained by the threat or inducement of a person in authority, facts discovered in consequence thereof, and so much of such confession as distinctly relates to such facts, may be proved.

Thus, a prisoner accused of burglary made a confession which was strictly inadmissible. Part of the confession was that he had thrown a lantern into a pond. The facts, that he said so, and that the lantern was found in the pond in consequence, were allowed to be proved. The other parts of the statement were not given in evidence.

Note.—The rule as above stated is apparently considered correct now, although earlier cases are inconsistent with it. Of course such rule gives the prisoner away altogether in such cases, notwithstanding that the confession was extorted. Perhaps there is still some doubt on the point.

R. v. JARVIS
(1867).

L. R. 1 C. C. R. 96; 37 L. J. M. C. 1; 16 W. R. 111.

A "threat or promise" must offer some temporal advantage or disadvantage connected with the prosecution in order to render a confession involuntary.

Exhortations to confess on moral or religious grounds are not sufficient to exclude a confession.

One of a firm who employed the prisoner, having called him up into the private counting house of the firm, in the presence of another of the firm and two officers of police, said, "I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police: and I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue"; and having shown a letter to him, which he denied having written, added, "Take care, we know more than you think we know." The prisoner thereupon made a confession, which was held admissible.

KELLY, C.B. "The question is, do the words before us in substance and fairly considered import a threat of evil, or hold out a hope of benefit to the accused in case he should state the truth? . . . In the first place, this appears to me to be advice given by a master to a servant, and when he adds, 'So that if you have committed a fault you may not add to it by stating what is untrue,' **he appears to me to be giving further advice on moral grounds.** It is neither a threat that evil shall befall him, nor is it an inducement or holding out of advantage."

"As to the words, 'you had better,' referred to in the argument, there are many cases in which those words have occurred, and they seem to have acquired a sort of technical meaning, that they hold out an inducement or threat within the rule that excludes confessions under such circumstances. It is sufficient to say that those words have not been used on this occasion; and that **the words used appear**

to me to import advice given on moral grounds, and not to infringe upon the rule of law prohibiting a threat in these cases."

WILLES, J. "I agree; but if it had appeared that the prisoner could have supposed the words meant 'you had better,' I think the case would have been different."

R. v. LLOYD
(1834).
6 C. & P. 393.

The offer of some merely collateral convenience, or temporal advantage unconnected with the result of the prosecution, is not such a promise as will render a confession induced by it inadmissible. The promise, to have such effect, must have reference to the result of the prosecution.

The prisoner and his wife were both in custody for larceny, but in separate rooms. A person who was in the room where the former was in custody, said, "I hope you will tell, because Mrs. Gurner can ill afford to lose the money"; and the constable said, "If you will tell where the property is, you shall see your wife." A statement made afterwards by the prisoner was held admissible.

PATTESON, J. "I think that this is not such an inducement to confess as will exclude the evidence of what the prisoner said. It amounts only to this, that if he would tell where the money was, he should see his wife."

Note.—"The cases on the subject of what is an illegal inducement to confess are very numerous, and far from consistent with each other; and there can be little doubt that the salutory rule which excludes confessions unlawfully obtained has been applied to the rejection of many not coming within its principle, although Judges are now less disposed than they formerly were to hold that the language used amounts even to an inducement" (*Best on Evidence*, p. 461).

R. v. GIBBONS
(1823).
1 C. & P. 97.

The term "person in authority," in connection with confessions by prisoners, includes the prosecutor, officers of justice, and other persons directly connected with the prosecution only.

Thus, it was held not to include a medical man called in to attend the prisoner. A confession made to such a person, even under threat or inducement, is admissible.

PARK, J. "The only inducement had been held out (as was alleged) by a person having no sort of authority. . . . If the promise had been held out by any person having any office or authority, as the prosecutor, constable, etc., the case would be different."

DECLARATIONS BY DECEASED PERSONS.

PRELIMINARY NOTE.

It has long been recognised that the exclusion of evidence of statements made by deceased persons would frequently lead to a defeat of justice, and that they might in some cases be properly admitted when the circumstances were such that they could fairly be relied upon. In many cases there might be no other evidence available, the deceased person having been solely acquainted with the facts. In the six following cases the law has recognised that there is sufficient guarantee

of the credibility of such hearsay statements to allow of their admission:—

1. Declarations in course of duty.
2. „ against interest.
3. „ in pedigree cases.
4. „ as to public rights.
5. „ by dying persons in, trials for homicide.
6. „ by testators as to contents of Wills.

For the principle underlying these exceptions, see the remarks of Jessel, M.R., *post*, p, 182.

It should be observed that, although the term "declaration" may suggest rather a formal statement, yet statements made in any manner are generally admissible.

PRICE v. TORRINGTON
(1703).

SALKELD, 285; 2 LORD RAYMOND, 873.

Statements made by a person in the regular course of his business or duty are admissible evidence, after his death, of the facts stated. Such statements are known as "declarations in the course of duty."

"The plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was, that **the usual way of the plaintiff's dealing was** that the draymen came every night to the clerk of the brew-house and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their hands; and that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery; otherwise of the shop-book itself, without more."

DOE v. TURFORD
(1832).

3 B. & Ad. 890; 37 R. R. 581.

Declarations in the course of duty are admissible although the duty was only temporarily assumed.

Thus, where in consequence of the absence of his clerk, a solicitor had on one occasion performed the clerk's duty for him, and served and indorsed a notice as his clerk would have done, the indorsement of service on such notice was admissible as evidence of service.

Lord Tenterden, C.J. "Notices to quit were usually served by the clerks, and not by the principals; but a principal might occasionally serve such a notice, and we must assume that **when a principal served the notice, he would do what he required his clerk to do.** Now, here it is proved that Patteshall took the notice with him when he went out, and that the indorsement on it is in his handwriting. Then the indorsement, having been **made in the discharge of his duty,** was, according to the authorities cited, admissible evidence of the fact of the service of the original."

Parke, J. "The only question in the case is, whether the entry made by Mr. Patteshall was admissible in evidence, and I think it was, not on the ground that it was an entry against his own interest, but because the fact that such an entry was made at the time of his return from his journey was one of the chain of facts (there are many others) from which the delivery of the notice to quit might lawfully be inferred. . . . **It was proved to be the ordinary course of this office** that when notices to quit were served, indorsements like that in question were made; and it is to be presumed that Mr. Patteshall, one of the principals, observed the rule of the office as well as the clerks."

Taunton, J. "A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that that fact occurred, is admissible in evidence."

THE HENRY COXON
(1878).

L. R. 3 P. D. 156; 47 L. J. ADM. 83; 38 L. T. 819.

Declarations in the course of duty, in order to be admissible, must be contemporaneous, must be made by a person who has no interest to misrepresent, and must relate to his own acts only.

Thus, in an action against the owners of a ship for collision, entries made in the log book of a ship by the first mate, since deceased, were rejected on three grounds: (1) they were made two days after the occurrence recorded, whereas the "duty" was to make them immediately; (2) the first mate had an interest to misrepresent, so as to negative the idea of negligence of himself and the ship's crew; (3) the entries referred not only to his own acts, but to those of the crew, and such declarations are not admissible as to the acts of others.

PHILLIMORE, J. "Neither do I think that the entry can be considered as **contemporaneous**; also it was in the **interest** of the party who made it; and the authorities point to this, that when such evidence is admitted, it must relate to **acts done by the person** who makes the entry and not by others, but the mate must enter, not only the manœuvres on his own ship, but also the consequences of the manœuvres and navigation of the other ship. These different sets of facts are so inextricably mixed up that it is very difficult, if not impossible, to separate them. I therefore, for these reasons, reject this evidence."

CHAMBERS v. BERNASCONI
(1834).

3 L. J. EX. 373; 1 C. M. & R. 347; 4 TYR. 531; 40 R. R. 604.

Declarations in the course of duty are only evidence of the precise facts which it was the writer's duty to

state, and not of other matters which, though contained in the same statement, were merely collateral.

Thus, the question being whether A. was arrested in a certain parish; a certificate by a deceased officer, stating the fact, time and place of the arrest, was held inadmissible as to the place, as it was his duty merely to record the fact and time, not the place of his arrest.

LORD DENMAN, C.J. "We are all of opinion that, whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, **the statement of other circumstances, however naturally they might be thought to find a place in the narrative, is no proof of those circumstances.** Admitting, then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done."

Note.—It was shown in the above case to be the actual custom and practice of the officer to record the place of arrest, although it was not his strict duty to do so; but "the declarations must have been made in the discharge of a duty to a *third person;* a mere personal custom, not involving responsibility, is insufficient" (*Phipson on Evidence*, p. 264). See remarks on this case in *Smith's Leading Cases*, II. 324.

With regard to declarations against interest a different rule as to the extent of the admissibility of the declaration has been laid down—the whole being admissible (see *post*, p. 123.

R. v. BUCKLEY

(1873).

13 Cox, 293.

Declarations in the course of duty may be either written or verbal.

Thus, the question being whether A. murdered B., a policeman, at a certain time and place; a verbal report made by B. in the course

of his duty to his inspector, that he was about to go to that place at that time, in order to watch A.'s movements, was held admissible evidence to show that the prisoner and the deceased had met on that occasion.

HIGHAM v. RIDGWAY
(1808).

10 EAST, 109; 10 R. R. 235.

Statements made by a person against his "pecuniary" interest are admissible evidence, after his death, not only of the facts against such interest, but also of all other facts in the same statement. Such statements are known as "declarations against interest."

Thus, an entry made by a deceased surgeon, who had delivered a woman of a child, of his having done so on a certain day, and referring to his ledger, in which he had made a charge for his attendance which was marked as "paid," was evidence of the date of birth of such child; the word "paid" being held to be a statement against the pecuniary interest of the surgeon, as affording evidence against him if he had sued for his charges. All the facts stated in the same entry, including those in the ledger to which it referred, which were considered part of the same entry, were held admissible in evidence.

LORD ELLENBOROUGH, C.J. "I think the evidence here was properly admitted, upon the broad principle on which receiver's books have been admitted; namely, that **the entry made was in prejudice of the party making it.** In the case of the receiver, he charges himself to account for so much to his employer. In this case **the party repelled by his entry a claim which he would otherwise have had upon the other for work performed,** and medicines furnished to the wife; and the period of her delivery is the time for which the former charge is made, the date of which is the 22nd April; when it appears by other evidence that the man-midwife was in fact attending at the house of Wm. Fowden. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him that his claim was satisfied. **It is idle to say that the word 'paid' only shall be admitted in evidence, without the**

context, which explains to what it refers; we must, therefore, look to the rest of the entry, to see what the demand was which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with and made a part of the other entry of which it is explanatory. . . . The discharge in the book in his own handwriting repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears. Therefore, the entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it were not true, but he had an interest the other way, not to discharge a claim, which it appears from the evidence that he had."

LE BLANC, J. "**On inquiring into the truth of facts which happened a long time ago, the Courts have varied from the strict rules of evidence** applicable to facts of the same description happening in modern times, because of the difficulty or impossibility, by lapse of time, of proving those facts in the ordinary way by living witnesses. On this ground, **hearsay and reputation** (which latter is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another) **have been admitted as evidence in particular cases.** On that principle stands the evidence, in cases of pedigree, of declarations of the family who are dead, or of monumental inscriptions, or of entries made by them in family Bibles. The like evidence has been admitted in other cases **where the Court were satisfied that the person whose written entry or hearsay was offered** in evidence, had no interest in falsifying the fact, but, on the contrary, **had an interest against his declaration or written entry**; as in the case of receiver's books. . . . Here the entries were made by a person who, so far from having any interest to make them, had an interest the other way; and such entries against the interest of the party making them are clearly evidence of the fact stated."

BAYLEY, J. "This is no officious entry made by one who had no concern in the transaction; he had no interest in making it; and as **he thereby discharged an individual against whom he would otherwise have had a claim**, I think the entry was evidence by all the authorities. . . . If he had brought an action for his work, and had received notice to produce his books, this entry would have discharged the father. Now, all the cases agree that a written entry,

by which a man discharges another of a claim which he had against him, or charges himself with a debt to another, is evidence of the fact which he so admits against himself, there being no interest of his own to advance by such entry."

Note.—It should be particularly observed that such statements, in order to be admissible, must be against "pecuniary" or "proprietary" interest. It is not sufficient, for instance, that the statement was made under circumstances which show that the person making it would be liable to a criminal prosecution (*Sussex Peerage Case*, 11 C. & F. 108); although that would seem to be a case in which he would be liable to a pecuniary penalty, by way of fine, or to something admittedly worse, *i.e.*, imprisonment.

The above case and the next one refer to pecuniary interest, the two following, to proprietary interest.

TAYLOR v. WITHAM
(1876).

L. R. 3 CH. D. 605; 45 L. J. CH. 798.

If any part of a statement by a deceased person is against such person's pecuniary interest, the whole statement is admissible, even such parts thereof as prove to be actually in such person's interest. But though admissible, it may be of no weight as evidence.

Thus, the question being whether A. (deceased) had lent money to B.; an entry by A. in his book, "B. paid me three months' interest," followed by other entries connected therewith, and pointing to such a loan, was held admissible as evidence of the loan. The entry of such payment, by itself being against interest, was held to render admissible all the other entries, although the latter were actually for the declarant's interest.

JESSEL, M.R. "It is, no doubt, an established rule in the Courts of this country that **an entry against the interest of the man who made it is receivable in evidence after his death for all purposes.** . . . Of course, if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but **the question of admissibility**

is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony.

"Why should a man enter in his book 'interest paid me,' intending to make an entry for himself, and not against himself? Obviously the natural meaning of it is that it is against himself. 'Interest' standing alone would not help him; but these entries appear to be connected with two other entries: 'December 27. Paid off £20'; that is against his interest, but following that there is this, 'Left 1,980*l.*,' and that enables you to carry your eye to the connecting entry, which is, 'January, 1872. J. Witham acknowledged loan to this date 2,000*l.*,' and then you see you connect the entries with the 1,980*l.* No doubt, if admissible, it becomes very important evidence by reason of connecting it with the rest of the entry, but the entry itself is only an entry, 'Interest paid me.' It would not, standing alone, have been evidence of a debt from any particular person independent of the connection, and it appears to me when a man puts 'Interest paid me,' or 'Paid off 20*l.*,' it is *primâ facie* a clear entry against interest which ought to be admitted, and I admit it on the general ground. But, independently of the general ground, there is proof that the 2,000*l.* was paid to J. Witham, and there is proof that every one of these four sums of 20*l.* was actually paid to the testator, so that here again we have this fact, that there are entries not standing alone, but connected with the facts proved. I have no hesitation in saying that it is not only admissible as evidence, but is evidence of a very material character."

Note.—This rule as to the admissibility of the whole declaration should be compared with the rule that, in the case of declarations in course of duty, only so much thereof as it was strictly the declarant's duty to state is legally admissible (see *ante*, p. 119).

It should also be noted that the above case only deals with the question of *admissibility* of such evidence, not its *weight*, which is quite another matter.

PEACEABLE v. WATSON
(1811).
4 TAUNTON, 16; 13 R. R. 552.

Statements made by a person against his "proprietary" interest are admissible evidence after his death.

Statements made by anyone in possession of land tending to limit his interest therein to any less estate than a fee simple are admissible as declarations against his proprietary interest, a person in possession being presumed, until the contrary appears, to be the owner in fee simple.

Thus, a verbal statement by a deceased occupier of land, that he rented it under a certain person, was evidence of the latter's ownership.

SIR J. MANSFIELD, C.J. "Possession is *primâ facie* evidence of seisin in fee simple; the declaration of the possession that he is tenant to another makes most strongly, therefore, against his own interest, and consequently is admissible, but it must be first shown that he was in possession of the premises for which the ejectment is brought."

Note.—This rule is based on the presumption that a person in possession of land is owner in fee simple (see *ante*, p. 59). Without such presumption it would be impossible to say that any statement was against the occupier's proprietary interest.

PAPENDICK v. BRIDGWATER
(1855).
24 L. J. Q. B. 289; 1 JUR. N. S. 657; 5 E. & B. 166.

A declaration against proprietary interest is admissible only against those persons who are privy to the estate of the person making it.

Thus, a declaration by a deceased tenant of a farm, that he was not entitled to common of pasture in respect of the farm, was not admissible in evidence against the reversioner.

LORD CAMPBELL, C.J. "**You cannot receive in evidence a declaration of a tenant which derogates from the title of his landlord. Such evidence, if receivable, would be most mischievous,** because a tenant might thus destroy a valuable easement or be enabled to impose a servitude."

COLERIDGE, J. "Several exceptions have been established to the general rule that what is said by one person is no evidence against another person not in parity of estate and interest with him; but the present case is not within any of the exceptions recognised by the authorities . . . . **Nothing, I think, would lead to greater inconvenience** than that the landlord by loose declarations of his tenant should be ousted of his rights and burthened with a servitude."

ERLE, J. "This does not come within any of the exceptions which were introduced for general convenience, such as entries made in discharge of legal duty, or in the course of business, nor, what is more apposite, declarations binding privies. . . . . **This kind of evidence is of a most dangerous character,** because, though *primâ facie* it is against the interest of the declarant, it is easy to suggest circumstances under which a tenant going out from one farm and coming into another might wish to burden the farm he was about to leave, with a view to benefit the latter, and be induced to make a declaration which, under the actual circumstances, was not against his interest at the moment, but in furtherance of it. I am, therefore, of opinion that we ought not to extend the exception to this case."

BERKELEY PEERAGE CASE

(1811).

4 CAMPBELL, 401; 14 R. R. 782.

In "pedigree cases," the statements, verbal or written, and conduct of deceased persons, who were connected by blood or marriage with the family in question, if "ante litem motam," are admissible to prove relationship, or the facts upon which relationship depends, such as births, marriages and deaths. Entries in family Bibles, being looked on as family

registers, to which the family have general access, are of special weight in this connection. Such statements and conduct are known as "declarations in pedigree cases."

In a claim before the Committee of Privileges of the House of Lords, the legitimacy of the claimant was disputed, the question being whether his parents were privately married before his birth. The judges were summoned to give their opinions upon the following questions submitted to them by the Lords.

1. "Upon the trial of an ejectment respecting Black Acre, between A. and B., in which it was necessary for A. to prove that he was the legitimate son of J. S., A. after proving by other evidence that J. S. was his reputed father, offered to give in evidence *a deposition* made by J. S. in a cause in Chancery, instituted by A. against C. D., in order to perpetuate testimony to the alleged fact disputed by C. D., that he was the legitimate son of J. S., in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C. D. B., the defendant in the ejectment, did not claim Black Acre under either A. or C. D., the plaintiff and defendant in the Chancery suit.

"According to law, could the deposition of J. S. be received upon the trial of such ejectment, against B., as evidence of declarations of J. S. the alleged father in matters of pedigree?

2. "Upon the trial of an ejectment respecting Long Acre, between E. and F., in which it was necessary for E. to prove that he was the legitimate son of W., the said W. being at that time dead, E. after proving by other evidence that W. was his reputed father, offered to give in evidence *an entry in a Bible* in which Bible W. had made such entry in his own handwriting, that E. was his eldest son, born in lawful wedlock from G., the wife of W., on the 1st day of May, 1778, and signed by W. himself.

"Could such entry in such Bible be received to prove that E. is the legitimate son of W., as evidence of the declaration of W. in matter of pedigree?

3. "Upon the trial of an ejectment respecting Little Acre, between N. and P., in which it was necessary for N. to prove that he was the legitimate son of T., the said T. being at that time dead; N., after

proving by other evidence that T. was his reputed father, offered to give in evidence *an entry in a Bible*, in which Bible T. had made such entry in his own handwriting that N. was his eldest son, born in lawful wedlock from J., the wife of T., on the 1st day of May, 1778, and signed by T. himself; and it was proved in evidence on the said trial that the said T. had declared: that he, T., had made such entry for the express purpose of establishing the legitimacy, and the time of the birth, of his eldest son N., in case the same should be called in question, in any case or in any cause whatsoever, by any person, after the death of him the said T.

"Could such entry in such Bible be received, to prove that N. is the legitimate son of T., as evidence of the declaration of T. in matter of pedigree?"

In the opinion of the majority of the judges, the deposition, referred to in the first question, was inadmissible, as it was made after the dispute had arisen, *post litem motam*, when the party making the same had an interest to misrepresent the facts.

In the unanimous opinion of the Judges, the entries in the Bibles, referred to in the second and third questions, were admissible, as they were made *ante litem motam*; the entry, however, referred to in the third question being liable to suspicion on account of the reason stated therein for the making of it. The Lords gave judgment accordingly.

LORD ELDON, L.C. "**There does seem a hardship in rejecting** the declarations of the late Lord Berkeley after the dispute had arisen; for there was no way in which the claimant as heir apparent to his titles could have availed himself of his testimony . . . . Upon the admissibility of this evidence, Judges have held different opinions, and it might appear remarkable that a declaration under no sanction was receivable, and a declaration upon oath was not . . . . **The previous existence of the dispute would be a sufficient ground** to proceed upon. I have known no instance in which declarations *post litem motam* have been received. . . . . Therefore, although the authorities are at variance, principle and practice unite in rejecting the evidence."

"I introduced the Bible into the second and third questions, as the book in which such entries are usually made. If the entry be

the ordinary act of a man in the ordinary course of life, without interest or particular motive, this, as **the spontaneous effusion of his own mind, may be looked at without suspicion, and received without objection. Such is the contemporaneous entry in a family Bible, by a father, of the birth of a child.** But a doubt had been entertained upon this point, and it was fit that it should be solemnly decided. I agree to the admissibility of **similar entries in other books.** There is a great difference between the competency of evidence and the credit to which it is entitled."

LORD ELLENBOROUGH, C.J. "I had conceived some doubts whether this deposition could not be received as a declaration: but the arguments of the learned Judges have convinced me that it is inadmissible. It is only the answer to particular interrogatories, and may be very different from the genuine reputation upon the subject. I agree with the Judges that **an entry made in a Bible** does not therefore become evidence; but I cannot say it is not greatly strengthened by being found there, that being **the ordinary register in families.**"

LORD REDESDALE. "The circumstance of an entry being in **a family Bible, to which all the family have access,** gives it that solidity which it would not have if made in a book which remained in the exclusive possession of the father. Entries in family Bibles have therefore become **common evidence of pedigree** in this country; and in America, where there is no register of births or baptisms, hardly any other is known. With regard to the main question of the admissibility of the deposition as a declaration, one circumstance is in my mind decisive. In cases of reputation, the attorney takes down what old witnesses will prove, and it often happens that some of them afterwards die before the trial. But what was taken down from their mouths is never offered in evidence. And why? Because declarations *post litem motam* are not receivable."

BUTLER v. MOUNTGARRETT

(1859).

7 H. L. CASES, 633.

A controversy in a family, though not at that moment the subject of a lawsuit, is sufficient

to exclude evidence of declarations in pedigree cases.

There was offered in evidence a letter written by one member of the family to another, stating what the writer said he knew of a certain alleged marriage, material to the issue. This letter itself showed that a dispute had then arisen with reference to such marriage. It was held inadmissible as evidence.

LORD CAMPBELL, L.C. "The question is this, whether there had been a marriage in Scotland between Henry Butler and Mrs. Colebrooke. It was to prove that there had been such a marriage that the letter was proposed to be given in evidence. Had there not been a controversy upon that subject before the letter was written? And at the time when the letter was written, did it not subsist?"

"It was for the Judge to say whether the letter was admissible or inadmissible, and in order to come to a right conclusion upon that question, he was to consider whether there was evidence of *lis mota*, independently of the letter. And, moreover, he was bound to look at the letter, and to read it, and to see from its contents whether it was admissible or not. Without entering minutely into the evidence, I think that there was, independently of the letter, evidence to show that **before the letter was written there had been a controversy in the Butler family** as to whether there had been this Scotch marriage or not. But the letter itself, I think, is quite conclusive on the subject, because the whole scope of it shows that there had been such a controversy. And it was in my opinion **a controversy which was likely to create a bias** one way or the other upon the mind of every member of the family .... It was a matter of great interest to them, as to which no doubt each might take one side or another; and, according to the established rules of the law of England, if there is such a controversy, it is supposed to create a bias upon the minds of those who make statements upon the subject, and **it renders hearsay evidence upon the subject inadmissible.**"

LORD BROUGHAM. "If the letter had been produced and tendered, and there had been nothing else in the cause to lead the learned Judge's mind to the conclusion of the existence of *lis mota* at the time, and if he had therefore admitted the letter, the moment that letter was read, it would so clearly have proved that there was a *lis*

mota at the time, that it must at once have been struck out of the evidence."

LORD CRANWORTH. "If the letter itself shows that at that time there was a *lis mota*, then the letter is inadmissible. Now, upon the question whether this letter does show that or not, it appears to me that not only does it show that, but it shows nothing else . . . . It appears to me that to admit that letter would be directly at variance with the principle upon which this sort of evidence is received, and which is stated by Lord Eldon to be, that **such declarations are admitted upon the ground that they are the natural effusions of parties who must know the truth, 'upon occasions when their minds stand in an even position without any temptation to exceed or to fall short of the truth.'** As to every one of these propositions, the case here would fail."

LORD CHELMSFORD. "The very commencement of the letter shows that the parties were entering into a consideration of the state of the family with reference to the devolution of the honours and the estates which were involved in the discussion. The writer of the letter says, 'I think it fair and just to tell you what I know of the circumstances connected with Henry and Mrs. Colebrooke.' Then it was for the Judge to determine whether the letter itself, if there was no other evidence in the case, was not sufficient to establish the fact of there being a *lis mota*. The learned Judge was of that opinion, and rejected the evidence. I think the learned Judge was perfectly justified in so doing. I think the letter shows, in the strongest possible way, that there was a controversy existing."

HAINES v. GUTHRIE

(1884).

L. R. 13 Q. B. D. 818; 53 L. J. Q. B 521; 51 L. T. 645; 33 W. R. 99; 48 J. P. 756.

A "pedigree case," in which evidence of declarations by deceased relations is admissible, must be one in which the question of pedigree or relationship is directly in issue. In such cases only, any fact upon

which such relationship depends may be so proved, e.g., the date of a birth.

In an action for goods sold, to which the defence of infancy was pleaded, the date of birth being thus in question, a declaration made by defendant's deceased father as to such date was not admissible, it not being a pedigree case. If it had been, then such fact could have been proved thus.

BRETT, M.R. "It is obvious that in this case the question of family is immaterial, that the question whose son the defendant was is immaterial, and so were all such questions as whether he was a legitimate or a natural son, an elder or a younger son, or as to what relation he occupied with regard to the rest of the family. There was, therefore, **no question which could be called a question of family**; the only question is what was the date of the birth of the defendant."

"This evidence is *primâ facie* hearsay evidence, and the general rule of law is that hearsay evidence is not admissible; it is therefore sought to bring this case within some recognised exception to that rule . . . The exception which applies to this case is that the evidence is admissible in cases where it is a question of pedigree. Here there is **no question as to pedigree**, no question as to descent, none as to relationship, none as to the position of any person in any family—all these questions are wholly immaterial—so that in this case no question of pedigree could arise, and therefore this case does not fall within the recognised exception to the general rule of evidence."

BOWEN, L.J. "**No question is raised as to the family** of the defendant, or as to his position in that family; the only question raised was as to the age of this particular individual."

FRY, L.J. "**The exception is confined to questions of pedigree**, and no such question is raised in this case."

Note.—The evidence of the date of birth in this case was rejected merely on the ground that it was not a "pedigree case," *i.e.*, not a case in which a question of relationship was in issue. If it had been such a case, then the date of birth would have been a proper matter to prove in such manner.

JOHNSON v. LAWSON
(1824).

2 BINGHAM, 86; 9 MOORE, 183; 27 R. R. 558.

Declarations in pedigree cases must have been made by members of the family. If made by servants or intimate acquaintances, whatever their position or knowledge, they are not admissible.

BEST, C.J. "As a general rule, hearsay is not admissible evidence, but to this general rule pedigree-causes form an exception, from the very nature of the case. **Facts must be spoken of which took place many years before the trial, and of these, traditional evidence is often the only evidence which can be obtained**; but evidence of that kind must be subject to limitation, otherwise it would be a source of great uncertainty, and the limitation hitherto pursued, namely, the **confining such evidence to the declarations of relations of the family, affords a rule at once certain and intelligible.** If the admissibility of such evidence were not so restrained, we should on every occasion, before the testimony could be admitted, have to enter upon a long inquiry as to the degree of intimacy or confidence that subsisted between the party and the deceased declarant. . . . If we look into the cases, we shall find that **the rule has always been confined to the declarations of kindred** . . . it has been carried as far as it can with safety, and we must not extend it farther."

PARK, J. "It has been urged that great **confidence is often reposed in servants; but it is not confidence of this kind,** nor is it usual for a man to confer with his domestics on the situation of the various members of his family. My objection to the proposed evidence is, that if it were to be admitted, the practice would be so loose as to occasion great inconvenience; whereas, if the rule be confined to members of a family, the path to be pursued is clear and certain."

BURROUGH, J. "This exception from the general rule, that hearsay shall not be admitted, must be construed strictly, and **the natural limits of it are the declarations of members of the family. If we go beyond, where are we to stop?** Is the declaration of a

groom to be admitted? of a steward? of a chambermaid? of a nurse? may it be admitted if made a week after they have joined the family? and if not, at what time after? We should have to try in every case the life and habits of the party who made the declaration, and on account of this uncertainty such evidence must be excluded."

DOE v. GRIFFIN
(1812).

15 EAST, 293; 13 R. R. 474.

Declarations in pedigree cases are not confined to matters within the personal knowledge of the declarant. The matter stated may be mere family tradition, or hearsay upon hearsay, so long as it is confined to the statements and belief of deceased members of the family.

Thus, where in an ejectment case the question arose whether a certain person had died without issue, evidence by an elderly lady, one of the family, was admitted to the effect that the person in question "had many years before, when a young man, gone abroad, and according to the repute of the family, had afterwards died in the West Indies, and that she had never heard in the family of his having been married."

LORD ELLENBOROUGH, C.J. "The evidence was sufficient to call upon the defendant to give *primâ facie* evidence at least that Thomas was married; for what other evidence could the lessor be expected to produce that Thomas was not married, than that none of the family had ever heard that he was?"

GOODRIGHT v. MOSS
(1777).

COWPER, 591.

Declarations in pedigree cases may be in any form, oral, written, carved on tombstones, inscribed on por-

traits, or on pedigrees, or even by conduct, as, for instance, by treating a child as legitimate or otherwise.

LORD MANSFIELD, C.J. "The question is, whether the declarations of the father and mother in their lifetime can be admitted in evidence after their death? **Tradition is sufficient in point of pedigree; circumstances may be proved. For instance,** suppose from the hour of one child's birth to the death of its parent, it had always been treated as illegitimate, and another introduced and considered as the heir of the family; that would be good evidence. An entry in a father's family Bible, an inscription on a tombstone, a pedigree hung up in the family mansion, are all good evidence. . . . If the *credit* of such declarations is impeached, it must be left to the jury to judge of."

WEEKS v. SPARKE

(1813).

1 M. & S. 679; 14 R. R. 546.

In proof of public or general rights or customs, or matters of public or general interest, statements made by deceased persons of competent knowledge as to the existence of such rights, etc., and as to the general reputation thereof in the neighbourhood, are admissible. Such statements are known as "declarations as to public and general rights."

So, on a question of prescriptive right of common, in which many persons had an interest, such evidence was allowed, on the ground that it was, in some degree, a public right. (But see note at end of this case.)

LORD ELLENBOROUGH, C.J. "The admission of hearsay evidence upon all occasions, whether in matters of public or private right, is somewhat of an anomaly, and forms an exception to the general rules of evidence. **The question here is whether this is a case of a public or merely private right.** . . . I confess myself at a loss fully to understand upon what principle, even in matters of public

right, reputation was even deemed admissible evidence. It is said, indeed, that upon questions of public right all are interested, and must be presumed conversant with them; and that is the distinction taken between public and private rights; but I must confess I have not been able to see the force of the principle on which that distinction is founded so clearly as others have done, though I must admit its existence; and it has not been controverted in argument to-day, that **in the case of public rights reputation is to be received in evidence.**"

"Reputation is in general weak evidence; and when it is admitted, it is the duty of the Judge to impress on the minds of the jury how little conclusive it ought to be, lest it should have more weight with them than it ought to have."

LE BLANC, J. "The question arose upon a claim of a prescriptive right of common; such a right as the party alleged to have existed beyond the time of legal memory; and the question is how that right is to be proved. First, it is to be proved by acts of enjoyment within the period of living memory. And when that foundation is laid, then inasmuch **as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons** (not any old persons, but persons who have been **conversant with the neighbourhood** where the waste lies over which the particular right of common is claimed), **of what they have heard other persons of the same neighbourhood, who are deceased, say respecting the right.** Thus far it is evidence as applicable to this prescriptive right, it being a prescription in which others are concerned as well as the person claiming it; because a right of common is to a certain degree a public right. And the only evidence of reputation which was received was that from persons connected with the district."

"In the same manner in questions of pedigree, although they are not of a public nature, the evidence of what persons connected with the family, have been heard to say, is received, as to the state of that family. **In like manner, also upon questions of boundary,** though the evidence of perambulations may be considered to a certain degree as evidence of an exercise of the right, yet it has been usual to go further and admit the evidence of what old persons who are deceased have been heard to say on those occasions."

"The rule generally adopted upon questions either of prescription or custom is this, that after a foundation is once laid of the right by proving acts of ownership, then the evidence of reputation becomes admissible, **such evidence being confined to what old persons who were in a situation to know what these rights are, have been heard to say concerning them.** The issue here was on the prescriptive right of common, and the evidence admitted was as to a right derogatory to that prescriptive right; which must be governed by the same rules."

BAYLEY, J. "**In cases of prescription, which must have originated beyond the time of legal memory, and of which it is impossible to establish the claim by evidence of the grant, reputation seems to be admissible,** and therefore for that reason, when instances have been adduced to show the exercise of the right claimed, it is usual to admit it. . . . I take it that where the term 'public right' is used, it does not mean public in the literal sense, but is synonymous with general; that is what concerns a multitude of persons. Now this is a general right exercised by a variety of persons, though not a public right of common."

DAMPIER, J. "**In public rights it is not disputed that reputation is admissible; and that it has been extended to other rights which cannot be strictly called public,** such as manors, parishes, and a modus, which comes the nearest to this case. That, strictly speaking, is a private right, but has been considered as public, as it regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district."

Note.—The above case is generally taken as the leading one, which first laid down the law clearly, although it has been disapproved of (see the next case) on the point whether the right in question was public or private.

Although such evidence is not admissible as to *private* rights, it is admissible both as to *public* and as to *general* rights.

Public rights are those common to all the community, such as rights to use highways, ferries, and public fisheries.

General rights are those common to a considerable class of the community, such as parochial or manorial rights.

With reference to the remark of Le Blanc, J., in the above case, that the right is first proved "by acts of enjoyment within the period of living memory," Sir James Stephen remarks: "This seems superfluous, as no jury would ever find that a public right of way existed, which had not been used in living memory, on the strength of a report that some deceased person had said that there once was such a right" (*Dig. Ev.*, p. 183).

It should be observed that such declarations may be made in any manner or form, as in oral statements, writings, deeds, depositions, maps, books, presentments of Manorial Courts, or verdicts, judgments or orders of competent Courts, such as Quarter Sessions.

LORD DUNRAVEN v. LLEWELLYN (1850).

19 L. J. Q. B. 388; 14 Jur. 1089; 15 Q. B. 791; 81 R. R. 809.

A public or general right, to be evidenced by reputation or declarations by deceased persons, must be one which is common to all persons interested, as to all the inhabitants of a particular manor. A right is not within the rule simply because it is enjoyed by many persons in their own individual right, such as a right of common enjoyed by several persons in the same manor in their individual capacities.

Evidence of reputation is admissible although no actual enjoyment of the right be proved.

On a question between the lord of a manor and the owner of a freehold estate within the manor, whether a piece of land was part of the lord's waste or part of the defendant's land, after proof had been given that there were many lands held of the manor the tenants of which had always exercised rights of common on the waste of the manor, evidence was offered, on the part of the lord, of declarations of deceased tenants that the land was parcel of the waste. It was held that these declarations were not admissible in evidence, as there is no common law right for all tenants of a manor to have common on the waste of the manor, but that each tenant who has the right has it as an incident by law attached to his particular grant, and that the numerous private rights of common of the several tenants do not compose one public right so as to render evidence of reputation admissible. It was also held that evidence of actual enjoyment of a right need not be given in order to render evidence of reputation admissible.

PARKE, B. "In the course of the argument we intimated our opinion that the **want of evidence of acts of enjoyment of the rights did not affect the admissibility of the evidence, but only its value when admitted.** We also stated that no objection could be made to the evidence, on the ground that it proceeded from persons who had not competent knowledge upon the subject, or from persons who were themselves interested in the question. The main inquiry was, whether this was a subject of a sufficiently public nature to justify the reception of hearsay evidence relating to it."

"**If this question had been one in which all the inhabitants of the manor, or all the tenants of it, or of a particular district of it, had been interested, reputation from any deceased inhabitant or tenant, or even deceased residents in the manor, would have been admissible,** such residents having presumably a knowledge of such local customs; and if there had been a common law right for every tenant of the manor to have common on the wastes of a manor, reputation from any deceased tenant as to the extent of those wastes, and therefore as to any particular land being waste of the manor, would have been admissible. But . . . it is not to be understood that every tenant of a manor has by the common law such a right, but only that certain tenants have such a right, not by prescription, but as a right by common law, incident to the grant."

"**This right, therefore, is not a common right of all tenants, but belongs only to each grantee of arable land by virtue of his individual grant,** and is an incident thereto. . . . We are therefore of opinion that this case is precisely in the same situation as if evidence had been offered that there were many persons, tenants of the manor, who had separate prescriptive rights over the lord's wastes, and **reputation is not admissible in the case of such separate rights,** each being private and depending on each separate prescription, unless the proposition can be supported, that because there are many such rights, the rights have a public character, and the evidence therefore becomes admissible. We think this position cannot be maintained."

"**It is impossible to say in such a case where the dividing point is.** What is the number of rights which is to cause their nature to be changed and to give them a public character? But it is said that there are cases which have decided that where there are

numerous private prescriptive rights, reputation is admissible, and the case of *Weeks* v. *Sparke* is relied upon as establishing that proposition. The reasons given by the different Judges in that case would certainly not be satisfactory at this day."

"We are of opinion, therefore, that the evidence of reputation offered in this case was, according to the well-established rule in the modern cases, inadmissible, as it is in reality in support of a mere private prescription, and the number of these private rights does not make them to be of a public nature."

R. v. BLISS
(1837).

7 AD. & E. 550; 2 N. & P. 464; W. W. & D. 624.

Declarations as to public rights must relate directly to the existence of the right itself, and not to particular facts which may support or negative it. The latter are liable to be misrepresented or misunderstood.

Thus, the question being whether a road was public or private, a statement made by a deceased resident that he had planted a tree to mark the boundary of the road was inadmissible.

LORD DENMAN, C.J. "Is it then evidence of reputation? Everything which depends upon hearsay should be received with great caution. Hearsay evidence in matters of this sort was received by Lord Ellenborough in the first case with great reluctance. **It is only to be received as showing general reputation, and not as evidence of particular facts.** Here the hearsay evidence relates to a particular fact, and therefore is inadmissible. The statement did not describe the road as public or private."

PATTESON, J. "To determine whether it was receivable as evidence of reputation, it is necessary to see what was the issue. It was whether this was or was not a public road. If the issue had been as to the boundary of a public road it might have been receivable in evidence, but evidence of reputation as to boundary cannot be given in evidence where the question is whether the road is public or private. **If the witness had said this always was a**

public road as far as this place, it would have been receivable. The statement is clearly not receivable as evidence of reputation."

WILLIAMS, J. "The declaration in this case related to a particular fact, and was not, therefore, admissible."

COLERIDGE, J. "No rule is more universal than that statements admissible in evidence on the ground that they are evidence of reputation **must relate to general matters and not to particular facts.**"

NEWCASTLE v. BROXTOWE
(1832).

4 B. & AD. 273; 1 N. & M. 598.

Persons whose statements are receivable in evidence as declarations as to public and general rights must be shown to have been "competent declarants"; that is, they must have been so situated as to the place in question, by residence, duty or other connection, that it may be presumed they had both the means and the motive for giving a true account of the matter.

Thus, in order to prove that a public building was within the hundred of Broxtowe, ancient orders made by justices at Quarter Sessions for the county, so describing it, were admissible without proof that such justices resided in the hundred or county, their competency being presumed from their office.

PARKE, J. "These documents were admitted, not as orders upon matters over which the magistrates had jurisdiction, but as evidence of reputation; in that point of view we are of opinion that they were admissible. Four of them contain an express statement, the fifth an implied one, that the Castle (or the Brewhouse, or the Park of Nottingham, which belong to it) is within the wapentake or hundred of Broxtowe. **The statement is made by the justices of the peace assembled in Sessions who, though they were not proved to be resiants within the county or hundred, must from the nature of their offices alone be presumed to have sufficient acquaintance with the subject** to which these declarations relate; and the

objection cannot prevail that they were made after a controversy upon that subject had arisen, because there appears to have been no dispute upon the particular question, whether the Castle and its precincts were in the hundred of Broxtowe. These statements, therefore, fall within the established rule as to the admission of evidence of reputation."

R. v. JENKINS
(1869).

L. R. 1 C. C. R. 187 ; 38 L. J. M. C. 82 ; 20 L. T. 372; 17 W. R. 621 ; 11 Cox, 250.

In trials for homicide, statements made by the deceased relating to the cause and circumstances of his death are admissible in evidence, provided the prosecution clearly prove that the deceased had at the time abandoned all hope of recovery. Such statements are known as "dying declarations."

Where, therefore, on a trial for murder of a woman, it was proved that when dying she had accused prisoner of the crime, and said she did so "with no hope at present of my recovery," it was held that such statement could not be received in evidence, as her conduct and the words "at present" suggested some faint hope of recovery.

KELLY, C.B. "I am of opinion that the result of the cases is, that **there must be an unqualified belief, without any hope of recovery, that the declarant is about to die.** According to the language of Eyre, C.B., every hope of this world must be gone. According to Tindal, C.J., any hope of recovery, however slight, must exclude the evidence. **Then the burden of proof lies entirely on the prosecution.** The Judge must be perfectly satisfied beyond a reasonable doubt that the declarant was under the belief that no hope of recovery existed. Now, in the statement as it read at first it was 'no hope of recovery;' then she herself desires the insertion of the important words 'at present.' We have to consider the effect of

those words under the circumstances under which they were uttered. For the prosecution we were asked to give no importance to those words; but the woman must have had some meaning, and, if so, we have to give effect to the meaning we think she had. It might have meant only that as the clerk had used the word 'present' when he first put the question to her, she thought it more correct that the same form should be adhered to in the written statement. She may, however, have meant to say, not that she had absolutely no hope, but that at present she had not, but she hoped still that ultimately a change might come, and then she might recover. **We should have to solve the doubt, if we had any, 'in favorem vitæ' in favour of the prisoner**; but we think the circumstances call upon us to give our decision in his favour."

BYLES, J. "These dying declarations are to be received with scrupulous, I had almost said with superstitious, care. The declarant is subject to no cross-examination. No oath need be administered. There can be no prosecution for perjury. There is always danger of mistake which cannot be corrected. **I think there should be the sense of danger of an almost immediate impending death.** Here the woman said, in effect, 'I have no hope at present.' The clerk wrote it down 'I have no hope.' She said 'That is not what I mean; I mean I have no hope at present.' That merely means, If I don't get better soon, I shall not recover."

R. v. MEAD
(1824).

2 B. & C. 605; 4 D. & R. 120; 26 R. R. 484.

A dying declaration is only admissible in trials for murder and manslaughter.

Thus, such a declaration was rejected in a trial for perjury.

ABBOTT, C.J. "Evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration."

Note.—This rule is also illustrated, as to a civil case, by *Stobart* v. *Dryden*, *ante*, p. 97.

R. v. WOODCOCK
(1789).

1 LEACH, C. C. 500.

A dying declaration is admissible although the deceased did not expressly refer to his expectation of death. It is sufficient if the circumstances show that he expected speedy death, and was without hope.

EYRE, C.B. "The general principle on which this species of evidence is admitted is, that they are declarations made in extremity, **when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced,** and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. But a difficulty also arises with respect to these declarations; for it has not appeared, **and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state** of mortality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions. The several witnesses could give no satisfactory information as to the sentiments of her mind upon this subject. The surgeon said that she did not seem to be at all sensible of the danger of her situation, dreadful as it appeared to all around her; but lay, submitting quietly to her fate, without explaining whether she thought herself likely to live or die. Upon the whole of this difficulty, however, my judgment is, that inasmuch **as she was mortally wounded, and was in a condition which rendered almost immediate death inevitable**; as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation; **her declarations, made under these circumstances, ought to be considered by a jury as being made under the impression of her approaching dissolution**; for, resigned as she appeared to be, she must have felt the hand of death, and must have considered herself as a dying woman. She continued to repeat, rationally and uniformly, the facts which she had disclosed from the moment her senses had

returned, until her tongue was no longer capable of performing its office. Declarations so made are certainly entitled to credit; they ought therefore to be received in evidence; but the degree of credit to which they are entitled must always be a matter for the sober consideration of the jury, under all the circumstances of the case."

R. v. PIKE

(1829).

3 C. & P. 598.

A dying declaration is not admissible unless the declarant would have been competent as a witness, and was mentally capable of appreciating his condition. Thus, imbecility or tender age may exclude the declaration.

The prisoner being indicted for murder of a child aged four years, it was proposed to put in evidence, as a dying declaration, what the child said shortly before her death. It was held that it was inadmissible.

PARK, J. "We allow the declaration of persons *in articulo mortis* to be given in evidence, if it appear that the person making such declaration was then under the deep impression that he was soon to render an account to his Maker. Now, as this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible."

Note.—For the sixth case of admissible declarations by deceased persons, viz., by testators as to their wills, see *post*, p. 179.

MAYOR OF DONCASTER v. DAY
(1810).

3 TAUNTON, 262; 12 R. R. 650.

When a witness, who gave evidence in a former proceeding between the same parties, involving the same issue, is dead, or unable to attend the second trial (for certain recognised reasons), his evidence so given may be proved and repeated by any person who heard it.

A new trial having been granted, application was made that, if any of the witnesses, many of whom were very aged, should die or become unable to attend the second trial, their evidence given on the former occasion might be read at the next trial.

SIR J. MANSFIELD, C.J. "You do not want a rule of Court for that purpose. **What a witness, since dead, has sworn upon a trial between the same parties, may, without any order of the Court, be given in evidence,** either from the Judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given."

Note.—The events in which such evidence taken in former proceedings between the same parties is admissible are not quite clear. It certainly cannot be given unless the witness cannot, in the opinion of the Court, reasonably be expected to attend on the second occasion. If he be (1) dead, (2) permanently insane, or (3) kept out of the way by the adverse party, it seems the evidence is clearly admissible; but if he be (4) ill or (5) out of the jurisdiction, or (6) he cannot be found, then it would seem to be a question for the Court, having regard to the special circumstances.

LLANOVER v. HOMFRAY
(1881).

L. R. 19 CH. D. 224; 30 W. R. 557.

Evidence given in former proceedings is admissible in subsequent proceedings although the parties in the

subsequent proceedings are not personally the same, provided they are the privies of or claim through the former parties.

Thus, where in 1815 evidence was given in an action between manorial tenants and the lord of a manor as to a manorial right; and in 1881 another action was tried, as to the same right, between the manorial tenants and the lord of the manor of that time, none of whom were personally parties to the former suit, yet, as they were all "privies in estate" of the former parties, the evidence given in the former action, by witnesses since deceased, was admitted in the atter action.

JESSEL, M.R. "The question has been raised whether this evidence is admissible in the present suit. I must say that I have no doubt whatever that it is. The suit **was a suit by persons who were privies in estate with the present tenants**; they were not, indeed, owners of the same estate, but as the suit was on behalf of all the tenants it included the then owners of the estate now belonging to the Messrs. *Phillips*, **and on the other side there was a lord of the manor, who is now represented by the present lord of the manor.** Therefore it was a suit between persons privy in estate to the parties in the present action. **The issue in that suit was the same** as that in the present action, and the evidence in one is therefore admissible in the other. Why should the evidence not be admissible? **The lord had an opportunity of cross-examining**, and the evidence answers every condition of admissibility, the last condition being that the **witnesses must be dead or not producible, which, of course, is the case now** with these old witnesses. . . . If the witnesses were now alive, of course their evidence could not be read, but they must be called. There is, in my opinion, no more objection to reading this evidence than there is in any other case where the witnesses have been called and are dead. If a witness gave evidence at the trial of an action, and a new trial was ordered, then if he were dead at the time of the new trial you would read his former evidence; but if he were alive you could not do so, but would have to call him again."

MORGAN v. NICHOLL
(1866).

L. R. 2 C. P. 117; 36 L. J. C. P. 86; 15 L. T. 184; 15 W. R. 110; 12 JUR. N. S. 963.

Evidence given in former proceedings is not admissible in subsequent proceedings merely on the ground that the parties in both proceedings claim in the same right. The parties must either be the same, or the later parties must claim under the former parties.

Thus, where, in 1856, A. brought an action of ejectment against X., and in 1866 B., the father of A., brought a similar action against the same defendant, claiming the same property under the same title, the plaintiff in the latter action was not allowed to read in evidence a shorthand writer's notes of the evidence given in the action of 1856, by a relation of the plaintiff, who gave evidence as to the pedigree, but who had since died.

ERLE, C.J. "If that former trial had been in an action brought against the defendant by the present plaintiff, or anyone claiming under him, the evidence would have been admissible. But the evidence ought not to be admissible against the defendant unless it would also have been admissible against the present plaintiff. In my opinion, the two plaintiffs, that is to say, **the plaintiff in the present action and the plaintiff in the former one, are perfect strangers**. On the former trial, the plaintiff, who was the son of the plaintiff in the present action, claimed under his father, in the belief that his father was dead; and on that trial this evidence of Henry Morgan was admitted. It turned out, however, that **the father** was not dead, and he has since brought this action, in which he **is a perfect stranger to the son, so far as this rule of law is concerned.** If the defendant had wanted to have used this evidence against the plaintiff in this action, he could not have done so; and therefore I think the evidence was not admissible for the plaintiff."

WILLES, J. "The question is, whether the rule as to the admissibility of evidence given by a witness on a former trial of the same matter in dispute, and between the same parties or their privies, extends to the present case; that is to say, whether all relations in

blood are bound by or may take advantage of the rule, because **the only thing here connecting the present plaintiff with the plaintiff in the former action is the relationship** of blood, the present plaintiff being the father of the former plaintiff. The argument would be the same if the two plaintiffs had been cousins, which shows its absurdity. . . . **He is no privy to the plaintiff in the former action, since a father does not claim through his son.** . . . There has been no case in which the evidence has been admitted where the parties to the action were not parties to the former action, except they were persons who claimed under such former parties."

KEATING, J. "The defendant was party to the former action, but the plaintiff was not, nor was he claiming under the plaintiff in the former action. A son is obliged to claim through his father; but **the father does not claim through the son, and for the present purpose they are strangers.**"

R. v. SCAIFE
(1851).

20 L. J. M. C. 229; 15 JUR. 607; 17 Q. B. 242; 2 DEN. 281; 5 COX, 243.

The deposition of a witness in a criminal case, if properly taken before a magistrate under the Indictable Offences Act, 1848, is admissible in evidence at the trial, not only if the witness is "dead, or so ill as not to be able to travel," as provided by such Act, but also when the witness is kept out of the way by the prisoner's procurement; but not if there be merely unexplained absence. If procurement of the absence be shown, and there are several prisoners, the deposition is evidence against those only who are proved to have procured such absence.

LORD CAMPBELL, C.J. "**The prisoner Smith having resorted to a contrivance to keep the witness out of the way, the evidence would be admissible against him, but it would not be admissible on that ground against the other prisoners.** The learned Judge does

not seem to have made any distinction in this respect, but to have admitted the evidence against the two who were convicted, without proof of any contrivance on their part."

PATTESON, J. "If there were enough to show that the witness was kept out of the way by Smith, the deposition would be admissible against him; but **it would not be admissible against the other prisoners, unless they were affected with the contrivance** of Smith. No such distinction appears to have been made, but the evidence was admitted generally against all the prisoners. It was assumed that all were connected with the contrivance, without any evidence whatever to support such an assumption."

ERLE, J. "With respect to two of the prisoners, the admissibility of the deposition must be rested solely upon the ground of **absence unexplained; . . . it is not receivable on that ground.**"

Note.—Although depositions are, by the Indictable Offences Act, 1848, s. 17, to be taken "in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence," yet they are not used as evidence upon the trial of such person if the witnesses are able to be present and to give their evidence again. The Act provides that "if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid *is dead, or so ill as not to be able to travel*, and if also it shall be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition," etc.

It was held in the above case that the admissibility of the depositions was not limited to the two cases mentioned in the Act, death and illness. They can probably be used also in the case of the insanity of a witness.

The magistrate's duties under the Indictable Offences Act, 1848, with reference to taking depositions, may be thus summarised:—

1. He must take the evidence of the witnesses for the prosecution, in the presence of the accused, allowing him to cross-examine, taking down such evidence in writing, causing it to be read to the accused and signed by the witnesses, and sign it himself.

2. He must ask the accused whether he wishes to say anything in answer, warning him that he need not do so, but that what he says may be given in evidence against him, taking down in writing what he says, read it over to him and sign it himself.

3. He must ask the accused whether he desires to call witnesses, take their evidence in the presence of the accused, cause it to be signed by the witnesses, and sign it himself.

In civil cases depositions may be taken by order (O. 37, r. 5).

DOCUMENTS.

PRELIMINARY NOTE.

When a party seeks to put in evidence the contents of a document, the "best evidence" rule lays down that he shall produce the original, the "primary evidence" thereof. This rule is strongly illustrated by the first of the cases following. The second of such cases shows that the rule only applies where the *contents* of the document are in question, and not merely its *existence*.

But in certain cases, where the party is unable to get the original, "secondary evidence" of the document is allowed, *i.e.*, either a copy of the document or verbal evidence of its contents.

The cases in which such secondary evidence of the contents of a document is allowed are:—

1. When the original is in the possession or power of the opposite party, who refuses to produce it after notice to produce.

2. When the original is in the possession of a stranger, not legally compellable to produce it, who refuses to do so when served with a *subpœna duces tecum*.

3. When the original is lost or destroyed, and it is proved that proper search has been made for it.

4. When the original cannot be brought to Court, either because it is physically impossible, or not legally allowed, to be so brought.

Cases are given on each of these points.

MACDONNELL v. EVANS

(1852).

11 C. B. 930; 87 R. R. 818.

The best evidence in the possession or power of the party tendering it must be given. As a rule the best

evidence of a document is the original document, which is treated as "primary evidence" of its contents. Such original must be produced unless its absence is accounted for.

In an action on a bill of exchange, a witness, called by the plaintiff, was asked in cross-examination by the defendant's counsel, who produced a letter purporting to have been written by the witness: "Did you not write that letter in answer to a letter charging you with forgery?" The counsel for the plaintiff objected to the question on the ground that it was an attempt to get in evidence the contents of a written document without producing the document itself. It was held that the objection was a good one.

JERVIS, C.J. "The rule of evidence which governs this case is applicable to all cases where witnesses are sworn to give evidence upon the trial of an issue. That rule is, that **the best evidence in the possession or power of the party must be produced.** What the best evidence is must depend upon circumstances. **Generally speaking, the original document is the best evidence; but circumstances may arise in which secondary evidence of the contents may be given.** In the present case, those circumstances do not exist. For anything that appeared, the defendant's counsel might have had the letter in his hand when he put the question. **It was sought to give secondary evidence of the contents of a letter, without in any way accounting for its absence,** or showing any attempt to obtain it. It is enough for us to decide upon the application of the general rule. The best evidence of the contents of the document was not tendered."

MAULE, J. "It is a general rule that, if you want to get at the contents of a written document, the proper way is, to produce it, if you can. That is a rule in which the common sense of mankind concurs. **If the paper is in the possession of the party** who seeks to have the jury infer something from its contents, he should let them see it. That is the general and ordinary rule: the contents can only be proved by the writing itself. **If the document does not exist, or the party seeking to show its contents cannot get at it,** he is at liberty to give secondary evidence, because in that case no better is to be had. An early writer on the law of evidence states the rule to

be, that you shall not give evidence which shows that better is in existence. That seems to me to be a reasonable way of dealing with the matter. Here, the very form of the question, 'Did you not write that letter in answer to a letter containing so and so?' assumes that there is another letter in existence, the production of which would be the best proof of its contents. **There was nothing to show why that letter was not forthcoming.** Our decision does not, and need not, go further than that."

CRESSWELL, J. "It is said here that the object of the question objected to was merely to test the accuracy of the witness's memory, to try his credit. But, shift it as you will, it was a mere attempt to get in evidence of the contents of a written document, without putting in the document itself. The jury were expected and intended to be induced to act upon the inference that the fact existed which that letter was assumed to state. **There was nothing to show that the defendant had not the letter in his possession or under his control at the time.** If the contents of an absent document may be repeated under pretence of testing the credit or the memory of a witness, it will always be in the power of parties to evade the rule which requires the best evidence to be produced, viz., the instrument itself. The most mischievous consequences would, I conceive, result from such a relaxation of the rule."

R. v. ELWORTHY

(1867).

L. R. 1 C. C. R. 103; 37 L. J. M. C. 3; 17 L. T. 293; 16 W. R. 207; 10 Cox, C. C. 579.

The original document must be produced whenever there is a question as to its contents, unless for special reasons secondary evidence is allowed; for instance, where it is in the possession of the other party and notice to produce the original has been given to him.

But where its contents are not in question, the document being in the position of a chattel or piece of

property merely, as where there are conflicting claims as to its possession, there is no legal obligation to produce it.

A solicitor was indicted for perjury in having sworn there was no draft of a certain statutory declaration. No notice to produce this draft had been given to the person in whose possession it was.

The materiality of the existence of such draft turned upon its contents and the fact of certain alterations having been made in it. It was held that secondary evidence of its contents was not admissible, as no notice to produce the original had been given, and the nature of the proceedings was not such as to operate as a notice to produce.

KELLY, C.B. "**The exact contents of the draft, therefore, became essential** to the prosecution on the present indictment, because upon its contents depended the materiality or immateriality of the evidence on the former trial. The prosecution then gave evidence of the existence of the draft, that it came into the prisoner's hands and had not passed from him. Parol evidence of its contents was thereupon admitted, and **the question raised is, whether, in order to give parol evidence of the contents of that document, notice to produce it ought to have been given.** There is no doubt that, according to the general rule of evidence, such notice must have been given; but **it is contended that this case falls within those cases which have established an exception** to the rule, and made the secondary evidence here admissible without notice to produce the original. **For example,** it is said that in trover for a deed or other written document, parol evidence might be given of the contents of the document without notice to the defendant to produce it; but the defendant there has notice by the nature of the action itself and the description of the document in the declaration, without further notice that he is called upon to produce the document. He can therefore do so if he thinks fit. **We do not, however, think that that case is applicable here.**"

"There was nothing on the indictment or the evidence to show that, in order to sustain this prosecution, the prisoner was called upon to admit secondary evidence of this document being given against him. If sufficient notice had been given to him, he might

have produced it. Speaking for myself, I think that the admissibility of secondary evidence, without the production of the best evidence or the document itself, ought not to be extended."

BRAMWELL, B. "**If the question had been merely as to the existence of the draft, I should have been inclined to think the evidence admissible**; but the prosecution gave in evidence the contents to show that the prisoner's denial of its existence was wilful; therefore the contents and the alterations therein became material. I think that parol testimony cannot be given of any existing written document without laying a proper foundation for it. No exception to that rule is here applicable. The indictment did not give notice to the prisoner that he would be required to produce the original draft."

WHARAM v. ROUTLEDGE

(1805).

5 ESPINASSE, 235; 8 R. R. 851.

A party who produces a document when called for may insist that it shall be put in evidence by his opponent if the latter uses it or inspects it.

LORD ELLENBOROUGH, C.J. "You cannot ask for a book of the opposite party and be determined upon the inspection of it whether you will use it or not. If you call for it you make it evidence for the other side if they think fit to use it."

R. v. HOLY TRINITY, HULL

(1827).

6 L. J. M. C. 24; 7 B. & C. 611; 1 M. & R. 444; 31 R. R. 267.

Although a certain legal relation or position has been created by a written document, yet the mere fact

of such relation or position may be proved by secondary evidence, without production of the document.

BAYLEY, J. "The general rule is that the contents of a written document cannot be proved without producing it. **But although there may be a written instrument between a landlord and tenant defining the terms of the tenancy, the fact of the tenancy may be proved by parol** without proving the terms of it. It was unnecessary in this case to prove by the written instrument either the fact of tenancy or the value of the premises."

LITTLEDALE, J. "Payment of rent as rent is evidence of tenancy, and may be proved without producing the written instrument."

DWYER v. COLLINS
(1852).

21 L. J. Ex. 225; 16 Jur. 569; 7 Ex. 639; 86 R. R. 770.

Secondary evidence of a document is admissible when the original is in the possession of the opposite party, who refuses to produce it after a proper notice to produce.

The object of a notice to produce is merely to give the opposite party sufficient opportunity to produce it if he pleases, and not that he may be able to explain, nullify or confirm it. Therefore, where the document is in Court at the time of the trial, a notice to produce it immediately is sufficient to render secondary evidence of its contents admissible if it be not produced.

PARKE, B. "The next question is, whether the bill being admitted to be in Court, parol evidence was admissible on its non-production by the attorney on demand, or whether previous notice to produce was necessary. **On principle the answer must depend on this: why the notice to produce is required.** If it be to give to the opponent notice that such a document would be used by the party to the

cause, so that the opponent may be enabled to prepare evidence to explain or confirm it, then, no doubt, a notice at the trial, although the document be in Court, is too late; but if it be merely to enable the party to have the document in Court, to produce it if he likes, and if he does not, to enable his opponent to give parol evidence, —if it be merely to exclude the argument that the opponent has not taken all reasonable means to procure the original, which he must do before he can be permitted to make use of secondary evidence, then the demand of production at the trial is sufficient."

"We think the plaintiff's alleged principle is not the true one on which the notice to produce is required, but that **it is merely to give sufficient opportunity to the opposite party to produce it if he pleases, and thereby to secure the best evidence** of its contents, and the request to produce it immediately is quite sufficient for that purpose if the document be in Court."

MILLS v. ODDY

(1834).

6 C. & P. 728; 40 R. R. 847.

Secondary evidence of a document is admissible when the original is in the hands of a stranger, who is not compellable by law to produce it, and who refuses to do so, either when summoned as a witness with a "subpœna duces tecum," or when sworn as a witness without a subpœna, if he admits that he has the document in Court.

In order to show the amount of ground-rent at which a certain house was held, a witness, not a party to the action, was called, having been subpœnaed to produce the lease. He said: "I am the principal clerk in the office of the Comptroller of the Bridge-house estates. I have the counterpart of the lease of this house from the Corporation of the City of London to a person named Longmore. I decline producing it as it is a title-deed of the Corporation. I am an attorney. The Comptroller of the Bridge-house estates is the

attorney and solicitor of the Corporation in all matters relating to the Bridge-house estates."

It was held that production of the deed was rightfully refused, and therefore secondary evidence of its contents might be given.

PARKE, B. "The attorney is not to produce his client's title-deeds, nor to disclose their contents; and this witness is in fact in the same situation as the attorney. The Comptroller is the solicitor of the Corporation for this purpose, and this gentleman is the principal clerk in his office."

"If you have anyone who has seen this lease, who does not claim under it as one of his title deeds, and who is not privileged as attorney or solicitor, he may give secondary evidence of its contents. **There is an impossibility of your producing it, as the person who has it cannot be compelled to produce it under his subpœna.**"

Note.—As to privilege for title-deeds, see *post*, p. 222.

R. v. INHABITANTS OF LLANFAETHLY (1853).

23 L. J. M. C. 33; 2 E. & B. 940; 2 C. L. R. 230.

Secondary evidence of a document is not admissible if a stranger wrongfully refuses to produce the original after being served with a subpœna to do so, as the witness can be compelled to produce the original.

A subpœna had been served on a witness to produce a rate-book, supposed to be in his possession. He did not attend, and the rate-book was not produced. It was held that parol evidence of rating was not admissible.

LORD CAMPBELL, C.J. "It has been held that if, under a *subpœna duces tecum*, the witness appears and stands on his privilege and refuses to produce the document, and the Judge admits the objection, secondary evidence is then admissible. But here no privilege existed, and **the witness would have been bound to produce** the rate-book, and would have been punishable for contempt if he had refused to do so."

ERLE, J. "The appellants had the duty cast upon them of establishing the contents of the rate-book, and they must therefore **either produce it or account satisfactorily for its absence.** They have not done either of these things by serving the party who is supposed to have the rate-book, but who, in fact, had it not, with a subpœna to produce it. I am further of opinion that, even if they had served the party in whose possession it really was, to produce the book, and that party has disobeyed the subpœna, secondary evidence of its contents would not have been admissible."

BREWSTER v. SEWELL

(1820).

3 B. & ALD. 296; 22 R. R. 395.

Secondary evidence of a document is admissible when the original is lost or destroyed, but it must be shown that proper search has been made for it. What is proper search depends on the nature and value of the document. More careful search will be required for a valuable than for a useless document.

ABBOTT, C.J. "All evidence is to be considered with regard to the matter with respect to which it is produced. Now it appears to be a **very different** thing, whether the subject of inquiry be a **useless paper,** which may reasonably be supposed to be lost, or whether it be an **important document** which the party might have an interest in keeping, and for the non-production of which no satisfactory reason is assigned. This is the case of a policy of insurance, by which a company undertook to indemnify the plaintiff against losses by fire. A fire took place, and a loss was paid. That having taken place, the original **policy became mere waste paper.** There was no reason to suppose that the policy could, at any future time, be called for, to answer any reasonable purpose whatever. . . . This being a case, therefore, where the loss or destruction of the paper may almost be presumed, **very slight evidence of its loss or destruction is sufficient.**"

"The clerk of the plaintiff's attorney then went to the plaintiff's

house, where the plaintiff himself showed him all his drawers and places where a person might reasonably be supposed to keep his papers; the clerk examines them all, searches a pile of papers, opens the iron chest, and, in short, he looks not only in every place which the plaintiff pointed out, but in every place which he thought, on his view of the premises, was likely to contain a paper of this description. **Upon such evidence, applied to such a paper, it does appear to me to be reasonable to presume that it was lost**, and that the legal presumption is, that it was absolutely lost."

BAYLEY, J. "**There is a great distinction between useful and useless papers.** The presumption of law is that a man will keep all those papers which are valuable to himself, and which may, with any degree of probability, be of any future use to him. The presumption on the contrary is that a man will not keep those papers which have entirely discharged their duty, and which are never likely to be required for any purpose whatever. Under the circumstances of this case, and considering the lapse of time which has occurred, I should have thought that much less evidence would have been sufficient to entitle the party to give the secondary evidence."

HOLROYD, J. "It appears that the document had for some time become wholly useless. The contents of the paper, at least as far as particular terms of the policy were concerned, were perfectly immaterial. . . . **Now the reason why the law requires the original instrument to be produced is this**, that other evidence is not so satisfactory, where the original document is in the possession of the party, and where it is in his power to produce it or to get it produced, provided he gives notice. In either of these cases, if he does not produce it, or take the necessary steps to obtain its production, but resorts to other evidence, the fair presumption is, that the original document would not answer his purpose, and that it would differ from the secondary evidence which he gives with respect to the instrument itself. . . . It seems to me, therefore, that **this being a useless instrument, where the particular terms of the instrument are immaterial, the party cannot be presumed to have any improper purpose in resorting to secondary evidence.** Then, as to the search for the paper, I think, for the reasons stated by the Court, that sufficient was done to entitle the party to give secondary evidence."

BEST, J. "It is very difficult to lay down any general rule as to

the degree of **diligence necessary to be used in searching for an original document**, to entitle the party to give secondary evidence of its contents. That **must depend, in a great measure, upon the circumstances** of each particular case. If a paper be of considerable value, or if there be reason to suspect that the party not producing it has a strong interest which would induce him to withhold it, a very strict examination would properly be required; but if a paper be utterly useless, and the party could not have any interest in keeping it back, a much less strict search would be necessary to let in parol evidence of its contents. It seems to me, however, in this case, that sufficient diligence was used."

MORTIMER v. McCALLAN
(1840).

4 JUR. 172; 6 M. & W. 58.

Secondary evidence of a document is admissible, where the original cannot be brought to Court; either on grounds of public convenience, as in the case of public registers or books of the Bank of England; or because it is physically impossible, as in the case of writings on walls, tombstones and the like.

In order to prove acceptance of certain stock by the defendant, evidence was adduced that a person unknown to the clerk in the Bank of England came there with one Taylor, and made an entry of his acceptance of the stock, and a witness was then called, who proved that he had inspected the Bank books, and that the signature to the acceptance of the stock was in the defendant's handwriting. It was held that this evidence was admissible to prove the acceptance of the stock by the defendant, and that it was not necessary that the Bank books themselves should be produced, they not being removable on the ground of public convenience.

LORD ABINGER, C.B. "It has been established by a series of decisions, the first of them I think by Lord Mansfield, that the

books of the Bank of England being of great concernment to the whole of the national creditors, the removal of them would be so inconvenient, that copies of them might be received in evidence. It was founded upon the principle, that the public inconvenience, from the removal of documents of that sort, would justify the introduction of secondary evidence. That principle has been adopted in a variety of cases, and has never been questioned since. I know there have been attempts to apply it in cases where it was not applicable: the first was the case of *Rex* v. *Lord George Gordon*, where copies of the journals of the House of Commons were offered to be given in evidence, and supported on the ground of the above decision by Lord Mansfield as to the books of the Bank of England; but they were rejected by him on the trial, on the ground that no such inconvenience would attend the removal of the journals of the House of Commons, as any wishing to remove them could get the sanction of the Speaker to do so. . . . The next case that arose was with respect to **the books of the Customs and Excise.** It was formerly the practice to produce them, but after some consideration it was thought that the public inconvenience was so great, that it has become **every day's practice, in this and the other Courts, to allow copies** of those books to be received in evidence. That goes upon the general principle of not removing books of general concernment."

"Then does not that principle apply in all such cases? The public inconvenience in this case is as great as in the case of any other books. I think a case has been aptly put by my brother Alderson, that **if a writing were on a wall,** might you not give evidence of the character of the handwriting, as probable evidence of who wrote it, without producing the wall in Court? Suppose a man, instead of printing a libel in the usual way, were to write it on the dead walls of the metropolis, is it to be said that he cannot be punished, because you cannot produce the wall in Court? May you not, in such a case, prove his handwriting?"

"I think it was competent evidence, for the purpose of proving the identity of the party who accepted this stock, to show that an entry in the books of the Bank of England was the handwriting of that party. **The principle of law is,** that where you cannot get the best possible evidence, you must take the next best; and where the law was laid down that you cannot remove the document in which

the writing is made, you are to be entitled to the next best evidence of it, by proving whose writing it is."

ALDERSON, B. "The Bank books are not capable of being produced without so much public inconvenience, that the Courts have directed them to remain in the Bank, and copies of them to be received in evidence for the purpose for which the books are receivable. **Then, if they are not removable on the ground of public inconvenience, that is upon the same footing in point of principle as in the case of that which is not removable by the physical nature of the thing itself.** Inscriptions upon tombstones or on a wall are proved every day in this way for that reason. The necessity of the case in the one instance, and in the other case the general public inconvenience which would follow from the books being removed. supplies the reason of the rule."

DOE v. ROSS

(1840).

10 L. J. Ex. 201; 4 JUR. 321; 7 M. & W. 102; 8 D. P. C. 389.

There are no degrees of secondary evidence. When a party is at liberty to adduce secondary evidence, he may adduce any description of the same he pleases.

Thus, although he has a copy of a document, he may give verbal evidence of it; subject of course to observation where more satisfactory evidence is thus withheld.

LORD ABINGER, C.B. "Upon examination of the cases, and upon principle, we think **there are no degrees of secondary evidence.** The rule is, that if you cannot produce the original, you may give parol evidence of its contents. **If indeed the party giving such parol evidence appears to have better secondary evidence in his power, which he does not produce, that is a fact to go to the jury,** from which they might sometimes presume that the evidence kept back would be adverse to the party withholding it. But the

law makes no distinction between one class of secondary evidence and another."

PARKE, B. "There can be no doubt that an attested copy is more satisfactory, and therefore, in that sense, better evidence than mere parol testimony; but whether it excludes parol testimony is a very different thing. **The law does not permit a man to give evidence which from its very nature shows that there is better evidence within his reach,** which he does not produce. And, therefore, parol evidence of the contents of a deed, or other written instrument, cannot be given, without producing or accounting for the instrument itself. But as soon as you have accounted for the original document, you may then give secondary evidence of its contents. When parol evidence is then tendered, it does not appear from the nature of such evidence that there is any attested copy, or better species of secondary evidence behind. **We know of nothing but of the deed which is accounted for, and therefore the parol evidence is in itself unobjectionable.** Does it then become inadmissible, if it be shown from other sources that a more satisfactory species of secondary evidence exists? I think it does not; and I have always understood the rule to be, that when a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power."

ALDERSON, B. "**The objection must arise from the nature of the evidence itself.** If you produce a copy, which shows that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case,—**the existence of an original does not show the existence of any copy**; nor does parol evidence of the contents of a deed show the existence of anything except the deed itself. **If one species of secondary evidence is to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed.** He may know of nothing but the original, and the other side, at the trial, may defeat him by showing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all."

DOE v. SUCKERMORE
(1837).

7 L. J. Q. B. 33; 5 A. & E. 703; 2 N. & P. 16; W. W. & D. 405; 44 R. R. 533.

Handwriting may be proved not only by the person who saw the particular document signed, but also by any person acquainted in any manner with the handwriting of the person said to have signed the document in question, e.g., by (a) having seen him write at any time, (b) having received documents purporting to be in his handwriting, or (c) having observed in the ordinary course of business documents purporting to be in his handwriting.

COLERIDGE, J. "**The rule as to the proof of handwriting, where the witness has not seen the party write the document in question, may be stated generally thus**:—either the witness has seen the party write on some other occasion, or he has corresponded with him, and transactions have taken place between them, upon the faith that letters purporting to have been written or signed by him have been so written or signed. On either supposition, the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his handwriting; and he is called on to speak as to the writing in question, by a reference to the standard so formed in his mind. It is obvious that **the weight of this evidence may vary in every conceivable degree**; but the principle appears to be sound."

WILLIAMS, J. "That proof of handwriting is to be submitted to the consideration of the jury, like every other species of proof, I apprehend to be clear. From the highest degree of certainty, carrying with it perfect assurance and conviction, to the lowest degree of probability upon which it is found to be unsafe to act, it may be, and constantly is, so submitted. **From continued and habitual inspection, or correspondence, or both, carried on till the trial itself, down to a single instance, or knowledge twenty years old, evidence may be received.**"

"I am aware of no rule attempting to prescribe the quantity of knowledge which is requisite to enable a witness to speak to his belief; what degree of freshness and recency in the correspondence to admit, or what antiquity to exclude, may (as the reason of the thing would induce one to expect) in vain be looked for."

PATTESON, J. "All evidence of handwriting, except where the witness sees the document written, is in its nature *comparison*. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. **That knowledge may have been acquired, either by seeing the party write,** in which case it will be stronger or weaker according to the number of times and the periods, and other circumstances under which the witness has seen the party write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; **or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting** of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party."

LORD DENMAN, C.J. "He did not see him sign it; nor has he ever seen him write: but this is confessedly immaterial, if he has had other adequate means of obtaining a knowledge of his hand. . . . **The clerk who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed.** The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me."

Note.—"Strictly speaking, the only evidence of handwriting which is entitled to be called direct is the evidence of a witness who proves that he himself wrote or signed the document in question, or that of a witness who proves that he saw the document written or signed. All other evidence of handwriting must rest in greater or less degree upon inferences drawn from the appearance of the writing in question or other circumstances." (*Wills on Circumstantial Evidence*, p. 184.)

It should be noted that by Statute there is another way of proving handwriting. The Common Law Procedure Act, 1854, enacted: "Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." This is re-enacted and applied to criminal cases by the Criminal Procedure Act, 1865.

Re SANDILANDS

(1871).

L. R. 6 C. P. 411.

There is a presumption that a signed document, purporting to be a deed, and attested as such, was duly sealed, although no trace of a seal appears.

Thus, a signed document, attested by witnesses and certified by Commissioners as a deed, was held sufficiently executed.

BOVILL, C.J. "**To constitute a sealing, neither wax, nor wafer, nor a piece of paper, nor even an impression, is necessary.** Here is something attached to this deed which may have been intended for a seal, but which from its nature is incapable of retaining an impression. **Coupled with the attestation** and the certificate, I think we are justified in granting the application that the deed and other documents may be received and filed by the proper officer, pursuant to the Statute."

BYLES, J. "**The sealing of a deed need not be by means of a seal; it may be done with the end of a ruler or anything else.** Nor is it necessary that wax should be used. **The attestation** clause says that the deed was signed, sealed, and delivered by the several parties; and the certificate of the two special commissioners says that the deed was produced before them, and that the married women 'acknowledged the same to be their respective acts and

deeds.' I think there was *primâ facie* evidence that the deed was sealed."

MONTAGUE SMITH, J. "Something was done with the intention of sealing the deed in question. I concur in granting this application, on the ground that the attestation is *primâ facie* evidence that the deed was sealed."

Note.—Although it is clear that a deed must be sealed, there is some doubt as to whether it must also be signed. The better opinion seems to be that it need not be signed. But the advantage of signature is obvious, as identifying the seal.

ABBOT v. PLUMBE
(1779).

1 DOUGLAS, 216.

When a document is required by law to be attested, one of the attesting witnesses must be called in order to prove it, if he be alive and capable of giving evidence.

This is so even if the person by whom the document was executed has admitted its execution by himself.

An action being brought by the assignees of a bankrupt, it became material to prove a debt due from the bankrupt under a bond executed by him and attested by an attorney living in Somersetshire (the proceedings being in London). The bond was produced, and a witness swore that the bankrupt had admitted its execution to him. It was held that this was not sufficient, and that the attesting witness must be called.

LORD MANSFIELD, C.J. "It is a technical rule that the subscribing witness must be produced, and it cannot be dispensed with unless it appear that his attendance could not be procured."

ASHURST, J. "If the evidence of the subscribing witness were to be dispensed with by this confession of the bankrupt, the defendant would be deprived of the benefit of cross-examining him concerning the time of the execution of the bond, which might be material."

BULLER, J. "It is necessary, to recover on a bond, to call the

subscribing witness, unless some reason can be shown for his absence."

Note.—The above case must now be considered as applicable to those cases only in which attestation of a document is legally required, for the Common Law Procedure Act, 1854, provides: "It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto."

ANDERSON v. WESTON
(1840).

6 BINGHAM, N. C. 296.

There is a presumption that a document was made on the date which it bears.

A document thirty years old, i.e., a document dated thirty years back, proves itself.

BOSANQUET, J. "The question is, what is the general rule of law on the subject, where an instrument is proved to be in the handwriting of a party, and to bear a certain date; whether that is evidence as to the time of making the instrument;—that it is not conclusive evidence is perfectly clear;—the question is, whether it is not *primâ facie* evidence."

"Now when a deed is produced, and the execution of that deed is proved by the subscribing witness, or by accounting for the absence of the subscribing witness by death or otherwise, and proving the signature, and that deed bears a date, as far as my experience goes, **that date has uniformly been taken to be *primâ facie* evidence that the deed was executed at the time when it purports to bear date.** It is the practice in cross-examination to inquire whether the deed was executed when it bears date, but I certainly never heard it contended that it was part of the proof of the person producing the instrument, not only to give evidence of the execution of the instrument, but in the first instance, and before any evidence is offered to render doubtful the time of making the instrument, that it was executed at the time it bears date."

"This is the case not merely with respect to instruments binding

on the person of the party in the cause, but also with respect to his title where a deed of conveyance comes from third parties."

"But there is another case which may be put on the subject, which is a very strong one in proof of this being the general rule: that is this. It is a general rule that **an instrument thirty years old proves itself**, provided it be produced from the proper custody: if an instrument be produced from a custody where deeds of that description ought to be, then, if the instrument be thirty years old, there is no necessity for further proof."

"**What is the meaning of its being thirty years old?** Parties are not called upon to prove that the deed has been in existence for thirty years; if **it bears date thirty years before the time of its production,** the course is, unless it be impeached, to receive that as proof of the instrument."

PEARCE v. HOOPER
(1810).

3 TAUNTON, 60.

Although a document must generally be proved by evidence of its due execution, this is not so where the document is produced by an opponent who himself claims some interest under it.

The plaintiff sued the defendant for trespass to land. The defendant gave notice to the plaintiff to produce, at the trial, the deeds under which he held the land. The plaintiff produced these, but he contended that the defendant must prove their due execution. The defendant contended that, since the deeds came from the hands of the plaintiff, under a notice to produce, and contained his title to the land, if he had any, further proof was unnecessary. It was held that the defendant need not prove execution.

SIR J. MANSFIELD, C.J. "The mere possession of an instrument does not dispense with the necessity which lies on the party calling for it, of producing the attesting witness. . . . Supposing that an heir-at-law is in possession of a will, and the devisee brings an ejectment, and calls on the heir to produce the will; there the heir claims,

not under the will, but against the will, and it would be very hard that the will should be taken to be proved against him, because he produces it; but that is very different from the case where a man is called on to produce the deed under which he holds an estate. The defendant has no interest in the fee-simple of the estate, if this deed does not convey it; consequently, **if he produces the deed under which he claims, shall it not be taken to be a good deed so far as relates to the execution, as against himself?**"

MEATH v. WINCHESTER
(1836).

3 BINGHAM, N. C. 183.

The rule that "ancient documents," i.e., those thirty years old, "prove themselves," or, in other words, are presumed to have been duly executed, applies only to those coming from "proper custody"; that is, not necessarily from the strictly legal or most proper custody, but from any custody consistent with their genuineness and legitimate origin, where they might reasonably be expected to be found.

Thus, documents which had belonged to a deceased bishop by virtue of his office, and which were found among his private papers in possession of his family, were held to be produced from proper custody, although the most proper custody of the same would have been in the hands of his successor, the present bishop.

TINDAL, C.J. "**These documents were found in a place in which, and under the care of persons with whom, papers of Bishop Dopping might naturally and reasonably be expected to be found;** and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit that the investigation commences, whether

it was reasonable and natural under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that whilst **there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable,** though differing in degree; some being more so, some less; and in those cases **the proposition to be determined is,** whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine."

MERES v. ANSELL
(1771).

3 WILSON, 275.

Parol evidence is not admissible to add to, vary, or contradict a written agreement.

An agreement in writing had been made between the parties for the exchange of certain land, etc., no mention being made therein as to a certain piece of land in dispute. The defendant called evidence to show that it was at the same time verbally agreed that such other land was to be included in the agreement. On such evidence a verdict was found for the defendant. The Court granted a new trial on the ground that such evidence was inadmissible.

PER CURIAM. "We are all clearly of opinion that the verdict is wrong, and must be set aside; **that no *parol* evidence is admissible to disannul and substantially to vary a written agreement;** the *parol* evidence in the present case totally annuls and substantially alters and impugns the written agreement. Indeed in some cases of wills and deeds, where there are two *Johns* named or two *Blackacres* mentioned, ***parol* evidence may be admitted to explain** which *John* or which *Blackacre* was meant and intended by the will or deed. The rules of evidence are universally the same in Courts of law and Courts of equity. Suppose a bill in equity was to be brought by the defendant to have a specific performance of this agreement, the Court would not admit *parol* evidence."

"**You cannot depart from the writing, but may argue touching the operation thereof.** If a man agrees in writing to sell *Blackacre* for 1,000*l.*, shall parol evidence be admitted that he intended *Whiteacre* should also pass? Certainly it shall not."

ALLEN v. PINK
(1838).
4 M. & W. 140; 1 H. & H. 207.

Parol evidence of a transaction is not excluded by the fact that a writing was made concerning it, unless such writing was in fact the transaction itself, and not merely a note or memorandum of it, or portion of it.

The plaintiff bought of the defendant a horse, and received from him the following memorandum :—"Bought of G. Pink a horse for the sum of 7*l.* 2*s.* 6*d.* G. Pink." The horse having proved vicious, the plaintiff sued for the return of the price, and gave evidence of a verbal warranty of the horse. It was held that such evidence was admissible, as the agreement itself had not been reduced into writing, the memorandum only referring to a portion of it.

LORD ABINGER, C.B. "The general principle is quite true, that if there has been a parol agreement, which is afterwards reduced by the parties into writing, that writing alone must be looked to to ascertain the terms of the contract; but the principle does not apply here; there was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant; the contract is first concluded by parol, and afterwards **the paper is drawn up**, which appears to have been meant **merely as a memorandum** of the transaction, or an informal receipt for the money, **not as containing the terms of the contract itself.**"

SMITH v. WILSON
(1832).

1 L. J. K. B. 194; 3 B. & Ad. 728; 37 R. R. 536.

Parol evidence is admissible to show that a word in a written document has been used with, and has acquired a special and unusual meaning, in the locality or among the persons in question, with reference to the subject-matter.

In a lease it was provided that at the end of the term, the tenant should leave not less than 10,000 rabbits on the premises, to be taken and paid for by the landlord, at the rate of 60*l.* "per thousand." It was held that evidence was admissible to show that the custom of that part of the country, in counting rabbits, was to allow six score to the hundred.

Lord Tenterden, C.J. "I think that where in a deed, or in a declaration, or other pleading, a term is used, to which an Act of Parliament has given a definite meaning, the use of the term will be governed by the meaning given by the Act of Parliament. There is no Act of Parliament which provides that an hundred rabbits shall consist of five score to the hundred. **Then we must suppose that the parties to this deed used the word 'thousand,' with reference to the subject-matter, according to the meaning which it received in that part of the country.** I cannot say, then, that evidence to show what was the acceptation of the term 'thousand,' with reference to this subject-matter, ought not to have been received at all."

Parke, J. "I am of the same opinion. I think the principle has been correctly laid down from the authorities, in the passage cited from Mr. Starkie's book—'Where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, **evidence to that effect is admissible, for the purpose of *applying* the instrument to its proper subject-matter.**'"

DOE v. NEEDS
(1836).

6 L. J. Ex. 59; 2 M. & W. 129; 46 R. R. 52.

Parol evidence is admissible to show what is the subject-matter to which the written instrument is applicable, and to explain latent (but not patent) ambiguities.

Thus, where a devise was "to George Gord the son of Gord," and there appeared by extrinsic evidence to be two persons answering such description, evidence was allowed of the circumstances and of the testator's statements of intention to show which of the two persons he meant.

PARKE, B. "**If upon the face of the devise, it had been uncertain** whether the devisor had selected a particular object of his bounty, **no evidence would have been admissible** to prove that he intended a gift to a certain individual: such would have been a case of *ambiguitas patens* within the meaning of Lord Bacon's rule, which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one; or, adopting the language of Lord Bacon, 'to make that pass without writing which the law appointeth shall not pass but by writing.' **But here, on the face of the devise, no such doubt arises.** There is no blank before the name of Gord the father, which might have occasioned a doubt whether the devisor had finally fixed on any certain person in his mind. The devisor has clearly selected a particular individual as the devisee. . . . Upon the proof of extrinsic facts, which is always allowed in order to enable the Court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were at the date of the will two persons, to each of whom the description would be equally applicable. . . . **The evidence of the declarations of the testator has not the effect of varying the instrument** in any way whatever: it only enables the Court to reject one of the subjects, or objects, to which the description in the will applies; and to determine which of the two the devisor understood to be signified by

the description which he used in the will. . . . He is pointed out in the devise itself by a description which, so far as it goes, is perfectly correct."

MORGAN v. GRIFFITH

(1871).

L. R. 6 Ex. 70; 40 L. J. Ex. 46; 23 L. T. 783; 16 W. R. 956.

Parol evidence is admissible to show any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms.

The plaintiff took a lease of land from the defendant, reserving to the latter the sporting rights. Evidence was admitted of a prior oral agreement by which the defendant promised to keep down the rabbits if the plaintiff would sign the lease, although the lease was silent on the point.

KELLY, C.B. "I think **the verbal agreement was entirely collateral to the lease**, and was founded on a good consideration. The plaintiff, unless the promise to destroy the rabbits had been given, would not have signed the lease, and a Court of equity would not have compelled him to do so, or only on the terms of the defendant performing his undertaking."

PIGOTT, B. "**The verbal agreement** in this case, although it does affect the mode of enjoyment of the land demised, is, I think, **purely collateral to the lease.** It was on the basis of its being performed that the lease was signed by the plaintiff, and **it does not appear to me to contain any terms which conflict with the written document.**"

Note.—There is no rule that there shall only be one agreement upon any matter. There may be two (or more), as in the above case, if they can consistently stand together; and one may be written and the other oral. If proceedings are taken on the written agreement, evidence may be given of the oral agreement. This is not "adding to" the written agreement, although it may, at first sight, look like it.

PYM v. CAMPBELL

(1856).

25 L. J. Q. B. 277; 27 L. T. 122; 4 W. R. 528; 20 JUR. N. S. 641; 6 E. & B. 370.

Parol evidence is admissible to show that a document, apparently complete and operative on its face, was subject to a verbal agreement that it should be conditional upon, and not operate until the happening of, a certain event, which has not occurred.

The defendants agreed in writing to buy of the plaintiff a certain invention. Evidence was tendered by the defendants to the effect that they declined to purchase unless one Abernethy, an engineer, approved of the machine, and that as Abernethy was absent, and one of the defendants could not conveniently return to sign the document after seeing him, it was expressly agreed verbally that the written document was signed conditionally upon Abernethy's approval being obtained; and that Abernethy had disapproved of the machine. It was held that such evidence was admissible to show that the written document was not operative.

ERLE, J. "There was a paper signed by the parties, and there would be a very strong presumption indeed that it contained all the terms agreed upon, and if the jury had found that it was signed *animo contrahendi*, I am clearly of opinion that no evidence to vary it would be admissible. But the matter goes a step farther here, for the jury have found that **the parties, when they signed the paper, expressly said,** "we do not agree to the terms contained in it; we are prevented by the absence of a person whose judgment we desire to have from making up our minds definitively, and therefore, although we put our names to the paper, we do so without making an agreement." I grant that there may be danger in admitting such evidence, and that a jury ought to look very scrupulously at such a case; but if it is a true case, all that can be said about the danger of admitting parol evidence tells equally against the party seeking to set up as an agreement a document which was never intended so to operate. **The distinction is,** that the evidence is admitted not to

vary or alter an actual written agreement, but to show that the paper was not at the time an agreement."

CROMPTON, J. "If the parties really intended this agreement to operate from its date, no doubt it could not be varied by parol. But the jury have found that **no absolute agreement was ever intended** to be made, and they were justified in so finding. Therefore the parties never had an agreeing mind, but signed the paper for convenience, leaving it to take effect or not according as Abernethy did or did not approve; and there is nothing to prevent their so doing."

LORD CAMPBELL, C.J. "It is well established that no alteration of a written instrument can be made by parol. But here **the evidence was not admitted to vary the written instrument, but to show that no agreement had been entered into**; and that evidence is found by the jury to be true. Before the paper was signed it was expressly declared by the defendants, and the plaintiff agreed, that the document was not to operate until the machine had been shown to Abernethy and he had approved of it. The paper was signed at that time merely because one of the defendants had another engagement, and could not conveniently go and see Abernethy and return and sign the paper, the plaintiff being contented with this; the signature, therefore, not being put for the purpose of binding the defendants, did not constitute an agreement. **By this evidence the plea denying the making of the agreement was proved.**"

WIGGLESWORTH v. DALLISON
(1779).

DOUGLAS, 201.

Parol evidence is admissible to show any local or trade custom of general application, in order that it may bind the parties, unless the contract actually made is inconsistent with such custom.

Therefore, in the case of an agricultural lease, evidence was allowed of a custom whereby, contrary to the general law, the tenant, on leaving at the end of his term, was allowed to take away his "way-going crop, that is to say, all the corn growing upon the said lands

which hath before the expiration of such term been sown by such tenant upon any part of such lands"; although the lease was in writing and no mention was therein made of such custom.

LORD MANSFIELD, C.J. "The custom is good. It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. **The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking,** as a heriot may be due by custom, although not mentioned in the grant or lease."

SUGDEN v. ST. LEONARD'S
(1876).

L. R. 1 P. D. 154; 45 L. J. P. 49; 34 L. T. 369; 24 W. R. 479.

Parol evidence is admissible to show the contents of a lost document.

When a question arises as to the contents or validity of a will, whether existing, lost or destroyed, statements or declarations made by the testator concerning such will, either as to his testamentary intentions or his testamentary acts, are admissible in proof thereof.

The will of Lord St. Leonard's was missing at his death, and was never found. A daughter of the deceased wrote out the contents of the will from memory, there being no draft or copy of it. The daughter had lived with the testator all her life; he had constantly consulted her about the will and explained its provisions to her, and she had from time to time assisted him to make and alter it. Her

statement of the will was in some degree corroborated by other papers of the testator, and also by his verbal statements made after the execution of the will to his friends and relatives.

The Court held that such statements or declarations made by the testator, whether before or after the execution of the will, were admissible as evidence of its contents, and granted probate of the will as written down by the daughter.

COCKBURN, C.J. "When the idea of the testator's having himself destroyed the will is done away with, the next question is, whether the will having been lost, secondary evidence can be given of its contents? Now that question is disposed of by the authority of the case of *Brown* v. *Brown*, which, as I think, has been recognised as perfectly sound. There Lord Campbell says, '**Parol evidence of the contents of a lost instrument may be received as much when it is a will as if it were any other document,**' and in that I, for one, most entirely concur. The consequence of a contrary ruling would be most mischievous. It would enable any person who desired, from some sinister motive, to frustrate the testamentary disposition of a dead man."

"The third question is, whether we have before us sufficient evidence of the contents of the will. This depends upon the evidence of Miss Sugden, and, I must say, upon her evidence alone, to this extent, that if we had not her evidence, all the other parol, and even the documentary evidence in the case, would not enable us to say that we had ascertained the contents of the will so as to give effect to it."

"**The question presents itself whether the declarations of the testator can be received as secondary evidence of the contents of the lost will.** No doubt, generally speaking, where secondary evidence is admissible, if oral, it must be given on oath; if documentary, it must be verified on oath. Nevertheless, **the declarations of deceased persons are, in several instances, admitted as exceptions to the general rule, when** such persons had peculiar means of knowledge, and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that **a man who has made his will stands pre-eminently in that position.** He must be taken to know the contents of the will he has made. If he speaks of its provisions, he can have no motive for misrepresenting

them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree, evidence not always to be relied upon, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case."

"I entertain no doubt that prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though of course not conclusive evidence, are yet legally admissible as secondary evidence of the contents of a lost will. . . . **The question is simply one of the admissibility of secondary evidence, and has to be determined by the rules of evidence alone.** I am, therefore, decidedly of opinion that all statements or declarations, written or oral, made by a testator prior to the execution of the will are admissible as evidence of its contents."

"The admissibility of declarations made subsequently to the execution of the will creates greater difficulties by reason of a dictum of Lord Campbell and a decision of Lord Penzance. In principle there appears to me to be no distinction. The position of the testator is the same, both as respects peculiar knowledge and motive for speaking the truth, which can be no less than the motives which he has for making statements as to his intentions prior to the execution of the will."

"I am therefore of opinion that the various statements of Lord St. Leonard's, whether before or after the execution of his will, are admissible to prove the contents of the will."

JESSEL, M.R. "Can we admit, as a matter of course, secondary evidence in proof of a will? Now I should have thought there could be but one answer to that question. . . . The meaning of secondary evidence is to supply the loss by accident or otherwise of primary evidence. . . . **The whole theory of secondary evidence depends upon this,** that the primary evidence is lost, and that it is against justice that the accident of the loss should deprive a man of the rights to which he would otherwise be entitled. **I am at a loss to discover any reason whatever for distinguishing between the loss of a will and the loss of a deed."**

"The next point, and one no doubt also of great importance, is what secondary evidence is admissible. In this particular instance there is the evidence of a person who had seen the will, and **the real point to be considered and decided is,** whether that evidence can be confirmed or corroborated by declarations of the testator made either to that witness or to other persons, and, if so, whether those declarations to be admissible in evidence must be limited to declarations made at or before the execution of the will, or may be extended to declarations made after the execution of the will."

"**As a rule the declarations, whether in writing or oral, made by deceased persons, are in our law not admissible** in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large **number of exceptions** have been made to the general rule."

"Now I take it that **the principle which underlies all these exceptions is the same.** In the **first** place, it must be a case in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the **next** place, the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And, **thirdly,** the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of dispute or litigation which the declarant might be supposed to favour. **Lastly,** and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar knowledge—knowledge not possessed in ordinary cases."

"**Now you will find that all these reasons . . . exist in this case,** that is the case of a testator declaring the contents of his will. Of course, as in the case of pedigree, **the Courts must be careful and cautious in admitting such evidence.** From its very nature it is evidence not open to the test of cross-examination, it is very often produced at second or third hand, and is therefore particularly liable to lose something of its colour in the course of transmission. It is so easily and so frequently fabricated that all Courts which dispose of such cases must be especially on their guard. **But that only goes to the question as to the weight to be attributed to the evidence** when admitted; it does not go to the question of admitting the

evidence itself, and I must say it appears to me that, having regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases to which I have referred, we should be equally justified and equally bound to admit it in this case."

"I should, therefore, entirely concur with the Lord Chief Justice's conclusion that **this evidence would be admissible, not only as regards that portion which was anterior to the execution of the will, but also as regards that portion of it which is posterior to its execution.**"

DOE v. CATOMORE
(1851).

20 L. J. Q. B. 364; 16 Q. B. 745; 83 R. R. 714.

An alteration, in a deed, is presumed to have been made before execution; in a will, after execution.

LORD CAMPBELL, C.J. "In this case the deed on which the plaintiff's title depended, when produced, appeared to have an interlineation and erasure in parts not material. Objection was made that the deed was void unless the plaintiff gave evidence to show when the alterations were made. The learned Judge left it to the jury to say whether the alterations were made before the execution of the deed; and it was found that they were."

"In moving for a new trial it was contended that this question ought not to have been left to the jury without some evidence besides the deed itself. In Co. Lit. 225 b. it is said that 'of ancient time if the deed appeared to be rased or interlined in places material, the Judges adjudged upon their view the deed to be void. But of latter time the Judges have left that to the jurors to try whether the rasing or interlining were before the delivery.' In a note, (1) [136], upon this passage in Hargrave and Butler's edition of 'Coke upon Littleton,' it is laid down: ''Tis to be presumed, that an interlining, if the contrary is not proved, was made at the time of making the deed.' This doctrine seems to us to rest upon principle. **A deed cannot be altered, after it is executed, without fraud or wrong. A testator may alter his will without**

fraud or wrong after it has been executed; and there is no ground for any presumption that the alteration was made before the will was executed."

"We therefore think that the defendant has no right to complain of the course pursued by the learned Judge at the trial."

STURLA v. FRECCIA
(1880).

L. R. 5 A. C. 641; 50 L. J. CH. 86; 43 L. T. 209; 29 W. R. 217; 44 J. P. 212.

Entries in "public documents," such as official books and registers, British or foreign, are evidence against everyone, provided there was a legal duty to make such entries for public information or reference, and the entries were made in proper time by the proper officers, after proper inquiry.

Although foreign public documents are within the rule, yet the report of a committee appointed by a public department in a foreign state, though addressed to that department and acted on by the Government, was not admitted in the English Court as evidence of the facts stated therein: there being no evidence of any such legal duty to make either the entries therein, or any particular inquiries on which they were based, nor any evidence that such report was to be for public reference.

LORD SELBORNE, L.C. "There is abundant proof that the report which contains the passage it is desired to use is an authentic public document of the Genoese Government, to which, so far as the good faith of those who made it is concerned, credit might be justly given on any occasion on which it might properly be used. But . . . **it does not appear that any particular rules were prescribed to them as to the kind of information which they should collect; still less as to the evidence which they were to require to substantiate such information.** . . . It appears to me to have been perfectly open to its members to receive any species of information, on hearsay or

otherwise, to which they themselves at the moment thought credit could be given; and therefore, I am unable to apply to them any analogy derived from the cases of Courts, commissioners, or other persons having a special duty or authority under the English law to make particular kinds of inquiries."

LORD HATHERLEY. "When you come to look at the character of the document which is sought to be produced, what do you find? There are no original entries to be found in that document, but there appear to have been books kept, although we have not any very precise information about how they were kept, or whose duty it was to keep them, and the like. . . . **I do not think this comes near the case of the heralds' books, nor the commissions for making specific inquiries,** these specific inquiries falling plainly under the head of a discharge of a duty, which duty is discharged in the only proper manner in which it could be discharged; and, therefore, the law taking notice that such had been the course of investigation or inquiry, and such had been the result of the due execution by the commission of that duty, gives credit to what the return states upon the matter."

LORD BLACKBURN. "It is an established rule of law that public documents are admitted for certain purposes. What a public document is, within that sense, is of course the great point which we have now to consider. . . . It should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer. **I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire,** as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the

purpose of being kept public, so that the persons concerned in it may have access to it afterwards. . . . Can the document in this case be said to come within that class of cases? I think it is impossible to look at it in that way. **There is not the slightest evidence, or the least circumstance, to lead me to the conclusion that it was even intended that this private and confidential report should be seen by anyone interested in it.** It was meant for private information, to guide the discretion of the Government. It was not, like the bishop's return of the first-fruits, for the public information, to be kept in the office and to be seen by all in the diocese who might be concerned when there came to be any litigation."

LORD WATSON. "**It does not appear** to me that the duty cast upon the committee necessarily, or even by fair implication, involved the necessity of making **any quasi-judicial or strict inquiry** into the circumstances which they were about to report. . . . The sort of commission that was given here was one of a very roving description, to find out every little circumstance, whatever it might be, wherever they could pick it up, and in whatever manner they could ascertain it. . . . I cannot conceive, when you take these circumstances into consideration along with the undoubted fact that **this was not made for the purpose of being recorded in a public register,** that it can have the authority of a public register."

R. v. SUTTON

(1816).

4 M. & S. 532.

Recitals in public Acts of Parliament are, like statements in public documents and State Papers generally, "primâ facie" evidence against everyone.

Thus, to prove that certain organised outrages had occurred in various parts of England, recitals that such outrages had occurred, contained in a public Statute, and in a Royal Proclamation offering a reward for the discovery of the offenders, were held admissible.

LORD ELLENBOROUGH, C.J. "**Public Acts of Parliament are binding upon every subject, because every subject is, in judgment of law, privy to the making of them,** and therefore supposed to know

them, and formerly the usage was for the sheriff to proclaim them at his county court; and yet what every subject is supposed to know, and what the Judge is bound judicially to take notice of, it is said the jury cannot advert to; for if this evidence was inadmissible, it must be because the jury could not be charged with it."

"**Next as to the proclamation; I consider it as an Act of State. The proclamation recites,** that it had been represented to the Prince Regent, that a number of persons had committed **various acts of outrage** in the town, and in different parts of the county of Nottingham, etc.; and that the Prince Regent has thought it necessary to propound certain rewards for the discovery and conviction of the persons concerned in such proceedings. The propounding of these rewards necessarily implies that such acts of outrage have actually been committed, for otherwise it would have been nugatory to propound them. I do not say that it was conclusive evidence of the fact that these outrages were committed; but **surely it was admissible,** and, like other acts of state, to be laid before the jury."

Le Blanc, J. "This evidence consists of the King's proclamation, reciting that it had been represented that certain disturbances caused by persons employed in the stocking manufactories had taken place in Nottingham and several parts of the county, and offering a reward for the discovery and apprehension of offenders. There are likewise two Acts of Parliament reciting in their preambles the existence of these outrages, and making provision in the body of them, the first, for the more exemplary punishment of persons committing these outrages; the second, for the better preserving the peace, by enforcing the duties of watching and warding. When the nature of these documents is considered, is it possible to say that they were not admissible, particularly as the libel refers to the conduct of the persons called *Luddites* in destroying frames in *Nottingham* and the neighbourhood, and compares that conduct with the conduct of the military in *America?* **Are not the documents material to show that these disturbances existed** in *Nottingham,* and existed to such a degree as to call for the interference of the Executive Government and the Legislature, to offer reward for their discovery, and to inflict a more exemplary punishment upon them, and to protect the peaceable inhabitants by compelling the observance of watch and ward? Surely they were evidence for this purpose,

when the inquiry respected a libel of the description laid in the information, tending, as it is charged, to alienate the minds of the subjects from the King and Government, and to make them think that what had been condemned at Nottingham by the Government, was held laudable in America; when, according to the language of the libel, they were singing a new tune to an old song. **I cannot see therefore any ground on which these public instruments could be objected to as inadmissible.** They seem to me to go clearly to prove the facts which are alleged, because they show in what way the Executive Government and the Legislature acted upon them."

BAYLEY, J. "**The proclamation** sets forth, that it had been represented to the Prince Regent that a number of persons, chiefly of those employed in the stocking manufactories, had actually committed various acts of outrage; it is therefore an assertion on the part of His Royal Highness, that such a representation had been made to him, and he proceeds to act upon it, by offering a reward for the discovery of such offenders. This I think **was evidence to this extent, and no farther**, that a representation was made to the Executive Government that such outrages existed, and that the Executive Government thought fit to act upon it; for they so far acted as to promulgate an Act of State upon it."

"**The preambles to the two Acts of Parliament I think are still more free from objection** than the proclamation, and they assume as facts that outrages did exist. **When we consider in what manner an Act of Parliament is passed**, and that it is a public proceeding in all its stages, and challenges public inquiry, and when passed is in contemplation of law the act of the whole body, it seems to me that its recital must be taken as admissible evidence."

BRETT v. BEALES

(1829).

M. & M. 416; 34 R. R. 499.

Recitals in private Acts of Parliament are evidence only against the parties to them, even although they may be declared public Acts for the purpose of proof.

A private Act, authorising the making and maintaining of a navigable canal, contained a recital that the Corporation of Cambridge

were entitled to divers tolls. The plaintiff was the lessee of the tolls under the Corporation of Cambridge, and he brought the action to recover such tolls. In support of the claim it was proposed to read the said recital as evidence, it being urged that the Act was for this purpose to be treated as a public statute (in which case the recital would have been evidence), as it was provided "that this Act should be deemed and taken to be a public Act, and shall be judicially taken notice of as such by all Judges, justices, and others, without being specially pleaded." It was held that the recital was not admissible in evidence.

LORD TENTERDEN, C.J. "The point is quite new, and of great importance, as it will apply to so large a class of statutes."

"Two grounds have been laid for the admission of this evidence: the one, that the concluding clause renders it admissible as a public Act; the other, that even independently of this clause, it is so from its nature. The answer given to the first was that **the clause only applied to the forms of pleading, and did not vary the general nature and operation of the Act.** I was inclined to that opinion at the time, and my learned brothers agree with me in that impression. We also think that the second ground fails. It is said that the bill gives a power of levying a toll on all the King's subjects, and therefore the Act is public; the power given is not so extensive, it is only to levy toll on such as shall think fit to use the navigation. The ground, therefore, on which it is said the Act is public, and the evidence admissible, fails; and I cannot receive it."

Note.—It was customary, before the year 1851, to insert a clause in private Acts of Parliament declaring that the Act should be deemed public and be judicially noticed. The effect of this clause was to dispense with the necessity, not only of pleading the Act specially, but of producing an examined copy, or a copy printed by the Printer for the Crown; a public Act requiring neither to be specially pleaded nor proved. By 13 Vict. c. 21, it is enacted: "That every Act made after the commencement of this Act shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such Act."

COMPETENCY OF WITNESSES.

PRELIMINARY NOTE.

Evidence must be given by legally competent witnesses. The normal man is competent, and presumed to be so. The law of competency is therefore practically the law of incompetency, consisting of rules of exclusion.

Formerly there were two grounds of exclusion—(1) incompetency from interest, and (2) mental incompetency. On the former ground, not only were the parties themselves excluded, but also all persons who were *in pari jure* with either party, or otherwise substantially interested in the proceedings. Successive Statutes have abolished this kind of incompetency, leaving the fact of interest in the proceedings to affect credibility merely.

The change in the law as to incompetency from interest was effected by the following steps:—

1833. The incompetency of persons *in pari jure* with the parties was abolished.

1843. Denman's Act provided that no person should be excluded by reason of incapacity from crime or interest, save the parties themselves or persons on whose behalf the action was brought or defended, and their husbands and wives.

1846. The County Courts Act provided that parties and their wives might give evidence in the new County Courts.

1851. Brougham's Act allowed parties to all civil proceedings, and the persons on whose behalf they were instituted, to give evidence, except in breach of promise and adultery cases.

1853. Husbands and wives of parties, etc., to civil proceedings were made competent, except in adultery cases.

1869. Parties in breach of promise and adultery cases were made competent.

1882. The Married Women's Property Act made husbands

and wives competent to give evidence against each other in proceedings under the Act for protection of their property.

1898. The Criminal Evidence Act made persons charged, and their wives and husbands, competent witnesses.

Other Acts, from 1833 to 1888, have simplified oaths and substituted affirmations, etc., and may be said to have rendered many persons competent witnesses.

Mental incompetency, as shown by the following cases, is a question of degree only. Stress is laid, in the older cases, upon the ability to understand the nature of an oath. The real question now is generally considered to be—is the witness mentally capable of understanding and giving an intelligible account of the matter in question?

R. v. BRASIER
(1779).

1 LEACH, C. C. 199.

Mental competency to give evidence depends not upon age but upon understanding or intelligence. There is no fixed limit of age under which an infant is excluded as a witness.

The question having arisen, in a prosecution for assault, whether the evidence of a child under seven years of age was admissible, it was submitted to the twelve Judges, who held that, under the circumstances, it was not admissible, as the child did not have sufficient understanding of the nature of an oath, without which (at that time) evidence could not be given. The Judges were unanimously of opinion :—

"That no testimony whatever can be legally received except upon oath ; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath, for **there is no precise or fixed rule as to the time within which infants are excluded from**

giving evidence, but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath their evidence cannot be received."

Note.—It is to be observed that the decision in the above case was based on the fact that the child appeared not to possess sufficient understanding of the nature and consequences of an oath. At the time of such decision no evidence could be given without an oath. This is not now always the case. For instance, the Criminal Law Amendment Act, 1885, and the Prevention of Cruelty to Children Act, 1894, both provide that, in proceedings thereunder, if a "child of tender years who is tendered as a witness does not, in the opinion of the Court, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the Court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth." The question in any case, whether as to taking the oath or giving the evidence, is one of understanding and intelligence, not of age.

This case "settled the modern law and practice relative to the admissibility of the testimony of children. As in the criminal law, *malitia supplet ætatem*, so here the maxim of the canonists was followed *prudentia supplet ætatem*" (*Best on Evidence*, p. 141).

R. v. HILL

(1851).

20 L. J. M. C. 222; 2 DEN. C. C. 254.

Persons suffering from insanity are not necessarily incompetent as witnesses. Whether they are competent or not depends on the character and extent of their insanity. A person insane on one matter can give evidence on matters not connected with his insanity.

LORD CAMPBELL, C.J. "If there be a delusion in the mind of a party tendered as a witness, it is for the Judge to see whether the party tendered has a sense of religion and understands the nature and sanction of an oath; and then if the Judge admits him as a witness, it is for the jury to say what degree of credit is to be given to his testimony. Various old authorities have been brought forward to show that a person *non compos mentis* is not a competent witness;

but **the question is in what sense the expression** *non compos mentis* **is used.** If by that term is meant one who does not understand the sanction of an oath, of course he ought not to be admitted as a witness; but he may be *non compos* in another sense, and yet understand the sanction of an oath and be capable of giving material testimony. . . . **He had a clear apprehension of the obligation of an oath, and was capable of giving a trustworthy account** of any transaction which took place before his eyes, and he was perfectly rational upon all subjects except with respect to his particular delusion."

COLERIDGE, J. "He appeared to be unusually well instructed in the nature and obligation of an oath, and *primâ facie* therefore to be quite competent to give evidence proper for the consideration of the jury. **If his evidence had, in the course of the trial, been so tainted with insanity as to be unworthy of credit, it was the proper function of the jury to disregard it,** and not to act upon it."

TALFOURD, J. "If the prisoner's counsel could maintain the proposition which he has laid down, that any human being who labours under a **delusion of the mind** is incompetent as a witness, there **would be most wide-spreading incompetency.** Martin Luther, it is said, believed that he had had a personal conflict with the devil. The celebrated Dr. Samuel Johnson was convinced that he had heard his mother calling to him in a supernatural manner."

LORD CAMPBELL, C.J. "The rule contended for would have excluded the evidence of Socrates, for he believed that he had a spirit always prompting him."

OMICHUND v. BARKER

(1744).

WILLES, 538; 1 ATKYNS, 21; 1 WILSON, 84.

The oath is not a peculiarly Christian ceremony. The mode of administering it may, and should, be adapted to the special religious belief of the deponent. But religious belief is necessary in the deponent.

Several persons resident in the East Indies and professing the Gentoo religion, having been examined on oath administered

according to the ceremonies of their religion, under a commission sent there by the Court of Chancery, it became a question whether those depositions could be read in evidence here. The Lord Chancellor, conceiving it to be a question of considerable importance, desired the assistance of the two Chief Justices and the Chief Baron, who were of opinion that the depositions ought to be unanimously read.

WILLES, C.J. "I only give my opinion that such infidels who believe a god and that he will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this, though a Christian country. And on the other hand, I am clearly of opinion that such infidels (if any such there be) who either do not believe a god, or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case or under any circumstances, for this plain reason: because an oath cannot possibly be any tie or obligation upon them. . . . The oath was administered to the witnesses in the same words as here in England, which fully answers the objection (if there was anything in it) that the form of the oath cannot be altered; and **after the oath was read and interpreted to them, they touched the Bramin's hand or foot the same being the usual and most solemn manner in which oaths are administered to witnesses who profess the Gentoo religion . . . it being their usual form, is as much signifying their assent as kissing the book is here**, where the party swearing likewise says nothing."

Note.—Protestants are sworn on the Evangelists, Jews on the Pentateuch, Mohammedans on the Koran, Hindoos on the Vedas or other sacred books, Parsees on the Zendavesta, Chinese on a broken saucer, etc.

By the Oaths Act, 1888, any person may make an affirmation instead of an oath, on stating either

(1) That he has no religious belief; or,

(2) That the taking of an oath is contrary to his religious belief.

The same Act also provides that any person may, if he so desire, be sworn in the Scotch manner, with uplifted hand, without kissing the book; and that, if an oath has been duly taken, it shall not be affected by the fact that the person taking it had no religious belief.

NICHOLLS v. DOWDING AND KEMP
(1815).

1 STARKIE, 81; 18 R. R. 746.

Leading questions may not be put, in examination-in-chief, unless they are necessary to lead the mind of the witness to the subject of inquiry; or they are upon matters merely introductory or not in dispute. Questions permitting the simple answer "Yes" or "No" are objectionable as a rule.

In order to prove that the defendants were partners, a witness was asked whether one of them had not interfered in the business of the other. The question was objected to as a leading one, but the Court allowed it to be put.

LORD ELLENBOROUGH, C.J. "I wish that objections to questions as leading might be a little better considered before they are made. **It is necessary, to a certain extent, to lead the mind of the witness to the subject of inquiry.** If questions are asked to which the answer 'Yes' or 'No' would be conclusive, they would certainly be objectionable; but in general no objections are more frivolous than those which are made to questions as leading ones."

Note.—The objection as to leading questions does not apply to cross-examination (see *post*, p. 198).

MAUGHAM v. HUBBARD
(1828).

6 L. J. K. B. 229; 8 B. & C. 14; 2 M. & R. 5; 32 R. R. 328.

A witness may refresh his memory by referring to any writing made by himself, or by another person if verified by him at or so soon after the transaction in question that the Judge considers it was fresh in his memory at the time.

But it is not necessary that the witness should have any independent recollection of the fact recorded, if he is prepared to swear to it on seeing the writing.

Refreshing memory by inspecting a document does not make it documentary evidence; so the fact that the writing would be inadmissible as a document for want of a stamp is immaterial.

A witness, called to prove the receipt of a sum of money, was shown an acknowledgment of the receipt of the money signed by himself. On seeing it, he said he had no doubt that he had received it, although he had no recollection of the fact. It was held that this was sufficient parol evidence of the payment of the money, and that the written acknowledgment having been used to refresh the memory of the witness, and not as evidence of the payment, did not require any stamp.

LORD TENTERDEN, C.J. "In order to make the paper itself evidence of the receipt of the money it ought to have been stamped. The consequence of its not having been stamped might be that the party who paid the money, in the event of the death of the person who received it, would lose his evidence of such payment. Here the witness, on seeing the entry signed by himself, said that he had no doubt that he had received the money. **The paper itself was not used as evidence** of the receipt of the money, but only to enable the witness to refresh his memory; and when he said that he had no doubt that he had received the money **there was sufficient parol evidence** to prove the payment."

BAYLEY, J. "Where a witness called to prove the execution of a deed sees his signature to the attestation, and says that he is, therefore, sure that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, **though the witness add that he has no recollection** of the fact of the execution of the deed."

BURROUGH v. MARTIN
(1809).

2 CAMPBELL, 112; 11 R. R. 679.

A witness may refresh his memory not only from documents in his own handwriting, but also from those made under his immediate observation when his recollection of the facts recorded was recent and fresh.

In an action on a charter-party, a witness was called to give an account of the voyage, and the log-book was laid before him for the purpose of refreshing his memory. Being asked whether he had written it himself, he said that he had not, but that from time to time he examined the entries in it while the events recorded were fresh in his recollection, and that he always found the entries accurate. He was allowed to refresh his memory from such book.

LORD ELLENBOROUGH, C.J. "If the witness looked at the log-book from time to time, while the occurrences mentioned in it were recent and fresh in his recollection, **it is as good as if he had written the whole with his own hand.** This collation gave him an ample opportunity to ascertain the correctness of the entries, and he may therefore refer to these on the same principle that witnesses are allowed to refresh their memory by reading letters and other documents which they themselves have written."

Note.—An expert witness may even refresh his memory by reference to text books, price lists, or other such printed matter.

WOOD v. MACKINSON
(1840).

2 M. & R. 273.

If a witness has been sworn, the opposite party is entitled to cross-examine him, although he is not examined-in-chief, but is merely called to produce a document.

But a party is not entitled to cross-examine a witness called by mistake, if the mistake be discovered before any question is put to him.

The plaintiff's counsel called a witness, who was sworn in the usual way; but, before he had put any question to him, he said he had been misinstructed as to what the witness was able to prove, and he should not examine him at all. The defendant's counsel then claimed the right to cross-examine the witness. It was held that he had no right to do so.

COLERIDGE, J. "Upon the whole, it appears to me that the more satisfactory principle to lay down is this, that if there really be a mistake, whether on the part of counsel or officer, and that mistake be discovered before the examination-in-chief has begun, the adverse party ought not to have the right to take advantage of this mistake by cross-examining the witness. Here the learned counsel explains that there has been a mistake, which consists in this, that the witness is found not to be able to speak at all as to the transaction which was supposed to be within his knowledge. **This is, I think, such a mistake as entitles the party calling the witness to withdraw him without his being subject to cross-examination.** If, indeed, the witness had been able to give evidence of the transaction which he was called to prove, but the counsel had discovered that the witness, besides that transaction, knew other matters inconvenient to be disclosed, and therefore attempted to withdraw him, that would be a different case. I think the defendants have here no right to cross-examine the witness."

PARKIN v. MOON

(1836).

7 C. & P. 408.

In cross-examination a witness may be examined by means of leading questions, as the presumption is that he is biassed against the opposite party and will

not be inclined to follow his lead. This is so, apparently, although the witness may actually appear to be favourable to the opposite party.

The plaintiff's counsel was cross-examining one of the defendant's witnesses (who, it seemed, was an unwilling witness for the defendant, but a willing one on the part of the plaintiff), by putting leading questions in the usual way. The defendant's counsel submitted that, under the circumstances, leading questions ought not to be allowed even on cross-examination. It was held that they were admissible.

ALDERSON, B. "I apprehend you may put a leading question to an unwilling witness on the examination in chief at the discretion of the Judge; but you may always put a leading question in cross-examination whether a witness be unwilling or not."

PRICE v. MANNING

(1889).

L. R. 42 CH. D. 372; 58 L. J. CH. 649; 61 L. T. 537; 37 W. R. 785.

A party cannot generally cross-examine or discredit his own witness.

It is in the discretion of the Judge whether a party shall be permitted to cross-examine a witness whom he has called, even if the witness be a hostile litigant, as when one party calls the other party as a witness.

COTTON, L.J. "The plaintiff says that, having called the defendant, he is entitled as of right to cross-examine him. . . . But in my opinion that is a matter in the discretion of the Judge. He sees the witness, and can determine from his manner whether he is so hostile that the plaintiff should be allowed to cross-examine him."

FRY, L.J. "It has been urged before us that, as the plaintiff called the defendant, he had a right to cross-examine him. . . . The

plaintiff had no right to cross-examine the witness he had called; he could only do so with the sanction of the presiding Judge."

LOPES, L.J. "Whether the witness called by one party is a litigant or non-litigant, it is a matter of discretion in the presiding Judge whether the witness has shown himself so hostile as to justify his cross-examination by the party calling him. This rule applies in a case where an opponent is called as a witness."

PRINCE v. SAMO

(1838).

7 L. J. Q. B. 123; 2 JUR. 323; 7 A. & E. 630; 3 N. & P. 139; 1 W. W. & H. 132; 45 R. R. 783.

Re-examination must be confined to matters explanatory of the cross-examination. No new matter must be introduced.

So, proof by a witness, on cross-examination, of a statement made by him at a former time, does not authorise proof, on re-examination, of all that he said at the same time, but only of so much thereof as is connected with the statement proved on cross-examination.

LORD DENMAN, C.J. "This was an action for a malicious arrest, on a false suggestion that money was lent by the defendant to the plaintiff, when it had, in fact, been given. The plaintiff called his attorney as a witness; he happened to be present at the trial of a prosecution for perjury, instituted by the plaintiff against a witness in the action, wherein he had been arrested. The defendant's counsel inquired of him in cross-examination whether the plaintiff had not, on the trial for perjury, stated that he himself had been insolvent repeatedly, and remanded by the Court. This question was not objected to. On his re-examination the same witness was asked whether the plaintiff had not also on that occasion given an account of the circumstances out of which the arrest had arisen, and what that account was, for the purpose of laying before the jury proof that the arrest was without cause, or malicious, of both which facts there was scarcely any, if any, evidence whatever. The question,

expressly confined to that purpose, was whether the plaintiff did not say, in his examination, that the money was given, and not lent. To this question the defendant's counsel objected, not on account of its leading form, but because the defendant, having proved one detached expression that fell from the plaintiff when a witness, does not make the whole of what he then said evidence in his own favour. My opinion was, that the witness might be asked as to everything said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it. **That a witness's statement of some one thing said by him, though drawn out by a cross-examination, does not permit the opposite party to add to it all that he may have uttered on the same occasion, was in effect decided** by seven out of eight Judges, whose opinion was taken by the House of Lords, in the progress of the bill of pains and penalties against Her Majesty Queen Caroline. **Lord Tenterden, in delivering that opinion, said**: 'I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce new matters not suited to the purpose of explaining either the expressions or the motives of the witness'; and as many things may pass in one and the same conversation, which do not relate to either, the learned Chief Justice declared the opinion of the Judges, that the witness could not be re-examined, even to the extent of all that might have passed relating to his becoming a witness, to which the statement proved had reference."

"**Upon the whole, we think that it must be taken as settled** that proof of a detached statement made by a witness at a former time, does not authorise proof by the party calling that witness, of all that he said at the same time, but only of so much as can be in some way connected with the statement proved."

EWER v. AMBROSE
(1825).

3 B. & C. 746.

If a witness gives evidence which is unfavourable to the party calling him, such party may contradict him by other witnesses, but he may not call general evidence to show that his own witness is not to be believed.

BAYLEY, J. "I have no doubt that if a witness gives evidence contrary to that which the party calling him expects, the party is at liberty afterwards to make out his own case by other witnesses."

HOLROYD, J. "I take the rule of law to be, that if a witness proves a case against the party calling him, the latter may show the truth by other witnesses. But it is undoubtedly true, that if a party calls a witness to prove a fact, **he cannot, when he finds the witness proves the contrary, give general evidence to show that that witness is not to be believed on his oath, but he may show by other evidence that he is mistaken** as to the fact which he is called to prove."

LITTLEDALE, J. "Where a witness is called by a party to prove his case, and he disproves that case, I think the party is still at liberty to prove his case by other witnesses. It would be a great hardship if the rule were otherwise, for **if a party had four witnesses upon whom he relied to prove his case, it would be very hard, that by calling first the one who happened to disprove it, he should be deprived of the testimony of the other three.** If he had called the three before the other who had disproved the case, it would have been a question for the jury upon the evidence whether they would give credit to the three or to the one. The order in which the witnesses happen to be called ought not, therefore, to make any difference."

HARRIS v. TIPPETT

(1811).

2 CAMPBELL, 637; 11 R. R. 767.

Although questions going to the credit of a witness are admissible upon cross-examination, yet, if they be directed to matters collateral to the issue, the answers must be accepted as conclusive, and other witnesses cannot be called to contradict him, except in a few cases.

A witness for the defendant, being asked in cross-examination whether he had not attempted to dissuade one of the plaintiff's witnesses from attending to give evidence, swore that he had not done so. The plaintiff's counsel then proposed to call back the other witness to contradict him. This was not allowed.

LAWRENCE, J. "Had this been a matter in issue, I would have allowed you to call witnesses to contradict what the last witness has sworn, but it is entirely collateral, and you must take his answer. I will permit questions to be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of trying his credit; but **when these questions are irrelevant to the issue on the record, you cannot call other witnesses to contradict the answers** he gives. No witness can be prepared to support his character as to particular facts, and such collateral inquiries would lead to endless confusion."

R. v. HOLMES

(1871).

L. R. 1 C. C. 334; 41 L. J. M. C. 12; 12 Cox, 137.

In prosecutions for rape and indecent assault, the prosecutrix may be cross-examined as to particular acts of immorality. As regards her acts committed with

the prisoner himself, witnesses may be called to contradict her, if she denies them; but not as to her acts committed with other persons.

KELLY, C.B. "On an indictment for rape, or for an attempt to commit a rape, or for an indecent assault, which, upon the circumstances of the case, amounts to an attempt to commit a rape, **a question put to the prosecutrix as to an act of connexion with a particular person, and denied by her, cannot be contradicted.** If a witness is cross-examined as to a collateral fact, the answer must be taken for better or worse, and the witness cannot be contradicted. If the question were admissible it might involve an inquiry into her whole life. . . . There is no doubt the prosecutrix may be asked **as to connexion with the prisoner on a prosecution for rape. There the fact has a direct bearing on the question** before the Court, which involves the fact of consent or non-consent on the part of the prosecutrix."

BYLES, J. "I concur. **I think the prosecutrix, on an indictment for rape, cannot be contradicted by men called to speak to connexion with her.** Rape may be committed on a prostitute; the evidence therefore is immaterial."

LUSH, J. "I am convinced that this evidence is too remote from the issue to be admissible. It has no bearing upon the particular charge, and was, therefore, properly rejected."

HANNEN, J. "I think no distinction can be drawn between a charge of rape and an indecent assault, and that the same reasoning applies to both cases. . . . It would be impossible for the prosecutrix to be prepared to meet the cases which might be produced."

EVIDENCE TO DISCREDIT WITNESSES.

PRELIMINARY NOTE.

As a general rule a party is not allowed to call witnesses to prove facts which tend to discredit his opponents' witnesses merely, and are not otherwise relevant to the matters in issue.

Such collateral inquiries are rejected on the grounds that they would unduly complicate and prolong trials without adequate reason, and that a man cannot be expected to defend all the acts of his life without notice. But there are four clearly recognised cases in which evidence to discredit is allowed.

Evidence may be called to show:—

1. That the witness has made previous statements inconsistent with his present evidence.

2. That he is prejudiced or biassed in favour of the party calling him, or is giving his evidence from some corrupt or indirect motive.

3. That he has such a general bad character for veracity that he is not to be believed on his oath.

4. That he has been convicted of a felony or misdemeanour.

Cases are here given on the first three points. The last one is laid down by statute, the Common Law Procedure Act, 1854, sect. 25.

ATTORNEY-GENERAL v. HITCHCOCK

(1847).

16 L. J. Ex. 259; 11 Jur. 478; 1 Ex. 91; 74 R. R. 592.

When a witness is asked in cross-examination if he has made a certain statement, which is material to the issue, and at variance with his evidence, and he denies that he made such a statement, witnesses may be called to prove that he did make such statement.

When a witness is cross-examined with the view of showing that he is biassed, or giving his evidence from some corrupt or indirect motive, and he denies it, witnesses may be called to prove that he is biassed; for instance, that he has been bribed to

give evidence, but not that a bribe has been offered to him and refused.

The defendant, a maltster, was charged on information with having used a cistern for the making of malt, without making an entry thereof, as required by Act of Parliament. A witness, having sworn that the cistern had been used, was asked if he had not said to one Cook that the Excise officers had offered him 20*l.* to say the cistern had been used; and he denied that he had made such statement. The defendant's counsel thereupon called Cook, and proposed to ask him whether the witness had told him so. The evidence was disallowed.

POLLOCK, C.B. "The test of whether an inquiry is collateral or not is, whether the fact to be elicited is material to the issue. If it be, then the witness may be contradicted, or, as it is better put by my Brother Alderson, thus: **If you ask a witness whether he has not made a certain statement which would be material, and opposed to part of his testimony, you may then call witnesses to prove that he has made the statement,** and the jury are at liberty to believe either the one account or the other. . . . The statement which may be contradicted must be one which refers to matter that may be given in evidence, and if answered in one way would contradict part of the witness's testimony, and be material."

"There is, however, a distinction between contradicting a witness in particulars stated by him, and those which have reference to his motives, temper, character, and feelings. . . . **A witness may be asked how he stands affected towards one of the parties**; and if his relation towards them is such as to prejudice his mind, and fill him with sentiments of revenge or other feelings of a similar kind, **and if he denies the fact, evidence may be given to show the state of his mind and feelings.** But these cases of the witness's connexion with the parties in feelings and sentiments are not to be confounded with those other cases where the matter to be admissible in evidence must be connected with the question."

"In the present case it could not be proved that a bribe was offered to the witness and not accepted, for such a fact is clearly irrelevant to the matter in issue. **The offer of a bribe is a matter**

of no importance, if it be not accepted, for it does not disparage the party to whom it is offered."

ALDERSON, B. "A witness may be asked a question, and if the answer tends to qualify another part of his testimony, evidence may be given in contradiction. So if the question relates not to what he has said, but to some fact material to the issue, the same rule prevails. . . . **The offer of a bribe by a witness to another, or the fact of a bribe having been accepted by him, tends to show that he is not impartial.**"

"A witness, however, is not to be examined as to collateral facts. In many cases his doing a particular act is collateral. In such cases his evidence as to the fact is to be received as final; but no witness ought to be called on to prove his whole life; and if contradiction of his testimony were permitted, he ought to be allowed to support it by other evidence, and to prove his innocence; the result of which would be, that an endless amount of collateral issues would have to be tried. The convenient administration of justice, therefore, requires that this course should not be adopted. If the witness has spoken falsely he may be indicted for perjury. **When the answer given is not material to the issue, public convenience requires that it be taken as decisive, and that no contradiction be allowed.** In the present case, the witness was asked whether he had been offered a bribe to say the cistern had been used. This was not material, nor did it qualify what had gone before, for his being offered a bribe did not show that he was not a fair and credible witness."

ROLFE, B. "The rules of evidence are founded on abstract and practical consideration; and one principle is, that **you may contradict any part of the testimony that has been given, and which tends to support the issue.** Here the question was, whether the witness had ever said he had been offered a bribe; and if that may be contradicted, not by showing that he had received a bribe, but by showing that he had said he had been offered a bribe, there would be no end to the collateral inquiries that would arise. **The offer of a bribe, if rejected, has no bearing upon the credit of the witness.** In fact, it was offered in the present case merely for the purpose of discrediting other persons, and not to disparage the witness."

GREENOUGH v. ECCLES
(1859).

28 L. J. C. P. 160; 5 Jur. N. S. 766; 5 C. B. N. S. 786.

Although a party calling a witness may not discredit him, even if he proves "adverse" or "unfavourable," yet if he proves actually "hostile" he may by the Common Law Procedure Act, 1854, by leave of the Judge, give evidence that such witness has made previous inconsistent statements. But he may not give general evidence of the bad character of a witness he himself produces.

Williams, J. "The question in this case is, whether in construing the terms of the 22nd section of the Common Law Procedure Act, 1854, 'in case the witness shall prove adverse,' the word 'adverse' ought to be understood as meaning merely 'unfavourable,' or as meaning 'hostile.' . . . **The section lays down three rules as to the power of a party to discredit his own witness: First,** he shall not be allowed to impeach his credit by general evidence of his bad character. **Secondly,** he may contradict him by other evidence. **Thirdly,** he may prove that he has made at other times a statement inconsistent with his present testimony. These three rules appear to include the principal questions that have ever arisen on the subject. . . . The law relating to the first two of these rules was settled before the passing of the Act, while, as to the third, the authorities were conflicting."

"The section requires the Judge to *form an opinion* that the witness is adverse, before the right to contradict or prove that he has made inconsistent statements is to be allowed to operate. **This is reasonable, and indeed necessary, if the word 'adverse' means 'hostile,' but wholly unreasonable and unnecessary if it means 'unfavourable.'** On these grounds we think the preferable construction is, that in case the witness shall, in the opinion of the Judge, prove 'hostile,' the party producing him may not only contradict him by other witnesses, as he might heretofore have done,

and may still do, if the witness is unfavourable, but may also, by leave of the Judge, prove that he has made inconsistent statements."

Note.—The words of sect. 22 of the Common Law Procedure Act, 1854, which in the above case came before the Court for construction, are:—

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove *adverse*, contradict him by other evidence, or by leave of the Judge prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

In the above case the word "adverse" was held to mean "hostile."

THOMAS v. DAVID
(1836).

7 C. & P. 350; 48 R. R. 794.

A witness may be cross-examined as to facts tending to show that he is prejudiced in any way in favour of the party calling him, and if he denies such facts, witnesses may be called to contradict him.

Thus, in an action on a promissory note, one of the plaintiff's witnesses, who was his female servant, and who was one of the attesting witnesses to the defendant's signature of the promissory note, was asked, on cross-examination, whether she did not constantly sleep in the same bed with her master. She said that she did not. The defendant was allowed to call a witness to prove she did.

COLERIDGE, J. "Is it not material to the issue, whether the principal witness who comes to support the plaintiff's case is his kept mistress? If the question had been, whether the witness had walked the streets as a common prostitute, I think that that would have been collateral to the issue, and that, had the witness denied such a charge, she could not have been contradicted; but here, **the question is, whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with him** to support a forgery, just in the same way as if she had

been asked if she was the sister or daughter of the plaintiff, and had denied that. I think that the contradiction is admissible."

Note.—See also *A.-G.* v. *Hitchcock*, *ante*, p. 205.

R. v. BROWN
(1867).

L. R. 1 C. C. R. 70; 36 L. J. M. C. 59.

A party may call witnesses to swear that, in their opinion, based on their knowledge of the general character and reputation of a witness on the other side, he is not to be believed on his oath.

At the close of the case for the prosecution, the counsel for the defendants, after having called several witnesses to character, proposed to call witnesses to prove that they would not believe the witnesses for the prosecution on their oaths. The Court refused to receive such evidence, but stated a case for the Court for Crown Cases Reserved. The evidence was held admissible.

KELLY, C.B. "It has been the practice to admit the evidence rejected in this case for centuries without dispute, and we have personal knowledge of its existence during our time. So long a practice cannot be altered but by the legislature."

MARTIN, B. "The practice has existed as long as I can remember in my professional career."

Note.—As to proof of previous convictions, see *ante*, p. 205.

PRIVILEGE.

PRELIMINARY NOTE.

Although a witness may be compelled to give evidence, he may still refuse to answer certain questions, or to produce certain documents, on well-recognised grounds of privilege.

The chief grounds of privilege are:—

1. That the answer to the question, or the production of

the document, would tend to incriminate the witness, or expose him to a criminal charge, penalty or forfeiture.

2. That the answer or document would disclose confidential communications between client and legal adviser, or information obtained for the purposes of litigation.

3. That the document asked for is a State document, the disclosure of which would be injurious to the public.

4. That the document relates solely to the title or case of the witness, if he be a party to the action.

5. That the document is a document of title of the witness merely, if he be no party to the action.

R. v. BOYES

(1861).

30 L. J. Q. B. 301; 5 L. T. 147; 7 JUR. 1158; 1 B. & S. 311.

No witness, whether a party or stranger, is compellable to answer any question, or to produce any document, the tendency of which would be to expose the witness, or the wife or husband of the witness, to any criminal charge, penalty, or forfeiture reasonably likely to be brought, sued for, or enforced. But the danger to be apprehended must be real or appreciable, with reference to the ordinary operation of law in the ordinary course of things.

Thus, where a witness had been pardoned under the Great Seal, and so could not be prosecuted in the ordinary way, it was no valid objection that he still remained liable to impeachment, to which a pardon is no bar.

COCKBURN, C.J. "The question on which our opinion is now required is, whether the enactment of the 3rd section of the Act of Settlement, that 'no pardon under the Great Seal shall be pleadable to an impeachment by the Commons in Parliament,' is a sufficient

reason for holding that the privilege of the witness still existed in this case, on the ground that the witness, though protected by the pardon against every other form of prosecution, might, possibly, be subject to parliamentary impeachment. . . . It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made *mala fide*, should be received as conclusive."

"With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities, we are clearly of opinion . . . that, to entitle a party called as a witness to the privilege of silence, **the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness** from his being compelled to answer. We, indeed, quite agree that if the fact of the witness being in danger be once made to appear, **great latitude should be allowed to him in judging for himself of the effect of any particular question**, there being no doubt . . . that a question, which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation a Judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril. Further than this, we are of opinion that **the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things**; not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. **The object of the law is** to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be

held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

"Now, in the present case, **no one seriously supposes that the witness runs the slightest risk of an impeachment** by the House of Commons. . . . To suppose that such a proceeding would be applied to the case of this witness would be ridiculous."

"It appears to us, therefore, that the witness in this case was not, in a rational point of view, in the slightest real danger from the evidence he was called upon to give when protected from all legal proceedings, and that it was, therefore, the duty of the presiding Judge to compel him to answer."

PYE v. BUTTERFIELD
(1864).

34 L. J. Q. B. 17; 11 JUR. 220; 5 B. & S. 829.

A witness can, on the ground of privilege, refuse to answer a question which tends to show he has done an act which would render him liable to forfeit property.

Therefore, in an action of ejectment, the Court refused to compel the defendant to answer interrogatories where the answer would tend to show that he had incurred a forfeiture of his lease by reason of his having broken a covenant therein not to under-let the premises.

COCKBURN, C.J. "According to the authorities which have been cited and the expressions used by the text-writers who have written upon the subject, those rules are perfectly fixed and established, that **no man shall be compelled to give an answer which shall have an effect leading to the forfeiture of his estate,** except when granted subject to a conditional limitation."

CROMPTON, J. "It is a principle of the law of evidence which these Courts have always recognised as applicable to the examination

of witnesses, and everything shows that they were averse to extending the power of discovery to cases of forfeiture. From the earliest times the rule has been adopted in the Courts of Equity with regard to discovery."

WHEELER v. LE MARCHANT
(1881).

L. R. 17 Ch. D. 675; 50 L. J. Ch. 793; 44 L. T. 632; 45 J. P. 728.

Communications made in professional confidence to counsel, solicitors and their clerks, may not be disclosed without consent of the client.

This privilege extends to communications, statements, reports, etc., made by other persons to the legal adviser, if obtained by the latter for the purpose of litigation, but not otherwise.

Communications made to any other persons than legal advisers, e.g., to medical advisers or clergymen, are not privileged.

The Court ordered production of letters which had passed between the solicitors of the defendants and their surveyor, except such (if any) as the defendants should state by affidavit to have been prepared confidentially after dispute had arisen between the plaintiff and the defendants and for the purpose of obtaining information, evidence or legal advice with reference to litigation existing or contemplated between the parties to the action.

Jessel, M.R. "**The principle is of a very limited character. It does not protect all confidential communications** which a man must necessarily make in order to obtain advice, even when necessary for the protection of his life or of his honour, to say nothing of his fortune. There are many communications which must be made, because without them the ordinary business of life cannot be carried on, and yet they are not protected. As I have said in the course of the argument, the communication made to a **medical man,** whose advice is sought by a patient . . . is not protected. Communications

made to the **priest** in the confessional, on matters perhaps considered by the penitent to be more important even than the care of his life or his fortune, are not protected. Communications made to a **friend** with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication which, in order to carry on the ordinary business of life, must necessarily be made, is protected. The protection is of a very limited character. **It is a protection in this country restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property.** It has never gone beyond the obtaining legal advice and assistance; and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery, in order that that legal advice may be obtained safely and sufficiently."

"**The actual communication to the solicitor by the client is, of course, protected,** and it is equally protected whether that communication is made by the client in person or by an agent on behalf of the client, and whether made to the solicitor in person or to a clerk or subordinate of the solicitor, who acts in his place and under his direction. Again, with the same view, **the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened,** or with a view to the defence or prosecution of such litigation. So, again, it does not matter whether the advice is obtained from the solicitor as to a dealing which is not the subject of litigation. What is protected is the communication necessary to obtain legal advice. It must be a communication made to the solicitor in that character and for that purpose."

"**But what we are asked to protect here is this:** The solicitor being consulted in a matter as to which **no dispute has arisen,** thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, or information of that character, and it is said that information given in answer to such application ought to be protected because it is desired or required by the solicitor in order to enable him the

better to give legal advice. It appears to me that it is not only **extending the rule beyond what has been previously laid down,** but **beyond what necessity warrants.** . . . It is a rule invented and maintained only for the purpose of enabling a man to obtain legal advice with safety."

BRETT, L.J. "The proposition laid before us for approval is, that where one of the parties to an action has in his possession or control documents which passed between his solicitor and third parties, and which contain either information or advice, those documents are protected in his hands from inspection on the ground that they are documents which passed between the solicitor and the third party for the purpose of enabling the solicitor to give legal advice to his client, although such information and advice was obtained by the solicitor for that purpose at a time **when there was no litigation pending between the parties nor any litigation contemplated.** It seems to me that that proposition cannot be acceded to. It is beyond any rule which has ever been laid down by the Court, and it seems to me that **it is beyond the principle of the rules which has been laid down.** The rule as to the non-production of communications between solicitor and client is a rule which has been determined upon as a matter of general or public policy. It is confined entirely to communications which take place with a view to obtaining legal advice from professional persons. It is so confined in terms, it seems to me it is so confined in principle, and it does not extend to the suggested case."

COTTON, L.J. "It is said communications between a client and his legal advisers, for obtaining legal advice, are privileged, and therefore any communication between the representatives of the client and the solicitor must also be privileged. That is a fallacious use of the word 'representatives.' If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position, as regards protection, as the client, and his communications with the solicitors stand in the same position as the communications of the principal with his solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the defendants, to do certain work, but that work was not the communicating

with the solicitors to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor."

"In fact, the proposition of the defendant comes to this, that all communications between a solicitor and a third person, in the course of his advising his client, are to be protected."

"It was conceded that there was no case that went that length, and the question is, whether we ought, in fully developing the principle, with all reasonable consequences, to protect such documents. Hitherto such **documents have been protected only when they have been made in contemplation of some litigation,** or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence, or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information are, in fact, the brief in the action, and ought to be protected."

R. v. COX AND RAILTON
(1884).

L. R. 14 Q. B. D. 153; 54 L. J. M. C. 41; 52 L. T. 25; 33 W. R. 396; 49 J. P. 374; 15 Cox, 611.

Privilege extends only to those communications between solicitor and client which are made in the legitimate course of professional employment of the solicitor.

Communications made in furtherance of any criminal or fraudulent purpose are not privileged.

The Court must in each case determine, upon the facts, whether the accused consulted his solicitor after the crime for the legitimate purpose of being defended, or before the crime for the purpose of being assisted in committing it.

So a solicitor was compelled to disclose what passed between the prisoners and himself on an occasion when they called to consult him

with reference to drawing up a Bill of Sale which was alleged to be fraudulent.

STEPHEN, J. "The conduct of Mr. Goodman, the solicitor, appears to have been unobjectionable. He was consulted in the common course of business, and gave a proper opinion in good faith. The question therefore is, whether, **if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud,** the legal adviser being ignorant of the purpose for which his advice is wanted, the communication between the two is privileged. We expressed our opinion at the end of the argument that **no such privilege** existed. If it did, the result would be that if a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his criminal purpose. Consequences so monstrous reduce to an absurdity any principle or rule in which they are involved."

"We were greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers as that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept."

"In each particular case **the Court must determine upon the facts** actually given in evidence, or proposed to be given in evidence, **whether it seems probable that the accused person may have consulted his legal adviser,** not after the commission of the crime **for the legitimate purpose of being defended,** but before the commission of the crime, for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each particular case, just as they must judge whether a witness deserves to be examined on the supposition that he is hostile, or whether

a dying declaration was made in the immediate prospect of death. . . . Of course, the power in question ought to be used with the greatest care not to hamper prisoners in making their defence, and not to enable unscrupulous persons to acquire knowledge to which they have no right, and every precaution should be taken against compelling unnecessary disclosures."

BEATSON v. SKENE
(1860).

29 L. J. Ex. 430; 2 L. T. 378; 8 W. R. 544; 6 Jur. N. S. 780; 5 H. & N. 838.

Documents and communications respecting matters of State are privileged from disclosure, whenever it would be injurious to the public interests. The judge will generally be guided in this matter by the opinion of the head of the department having the control of the document.

Pollock, C.B. "It appeared that the Secretary of State for War Mr. Sidney Herbert, had been subpœnaed to produce certain letters, written to the plaintiff by him, and also the minutes of a Court of Inquiry as to Colonel Shirley's conduct in writing the letters in question to General Vivian. Mr. Sidney Herbert attended at the trial, but objected to produce the documents on the ground that his doing so would be injurious to the public service. The learned Judge refused to compel their production on Mr. Sidney Herbert making this statement."

"We are all of opinion that it cannot be laid that all public documents of every sort, including treaties with foreign powers, and all the correspondence that may precede or accompany them, and all communications to the heads of departments, are to be produced and made public whenever a suitor in a court of justice thinks that his case requires such production. It is manifest, we think, that there must be a limit to the duty or the power of compelling the production of papers which are connected with acts of State."

"We are of opinion that **if the production of a State paper would**

be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, how is this to be determined?

"It is manifest it must be determined either by the presiding Judge or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service, an inquiry which cannot take place in private, and which, taking place in public, may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question, **whether the production of the document would be injurious to the public service, must be determined, not by the Judge, but by the head of the department** having the custody of the paper; and if he is in attendance, and states that in his opinion the production of that document would be injurious to the public service, we think the Judge ought not to compel the production of it. . . . **If the head of the department does not attend personally** to say that the production of the document will be injurious, but sends the document to be produced or not as the Judge may think proper, or . . . where a subordinate is sent with the document, with instructions to object, but nothing more; **then, indeed, the case may be different, and the Judge may compel the production of it.** . . . Perhaps cases might arise where the matter would be so clear that the Judge might well ask for it in spite of some official scruples as to producing it; but this must be considered rather as an extreme case; and extreme cases throw very little light upon the practical rules of law."

Note.—Although, generally, in cases of privilege, secondary evidence may be given of the facts, yet in the case of State documents the exclusion appears to be absolute, so that no evidence of the contents of such documents at all is admissible.

MORRIS v. EDWARDS

(1890).

L. R. 15 A. C. 309; 60 L. J. Q. B. 292; 63 L. T. 26.

A party to an action cannot be compelled to produce documents which he swears relate solely to his own

title or case, and do not tend to prove or support that of his adversary.

In an action to recover land, the defendant swore, in an affidavit of documents, that the documents in question related solely to his own title and did not tend in any way to prove or to support the plaintiff's title.

LORD HALSBURY, L.C. "**The affidavit appears to be as plain as anything can be**: 'I object to produce the said documents set forth in the first part of the second schedule hereto, on the ground that they relate solely to my own title to the freehold property in the statement of claim mentioned, and do not in any way tend to prove or to support the title of the plaintiffs or either of them.' It appears to me that **it is absolutely hopeless to contend that there is any authority for going behind that statement.** . . . It would be absolutely destructive of anything like privilege of documents, because in every case you might controvert an affidavit and have an interrogatory as to whether or not the document might be seen, and the 'privilege' would then be absolutely nugatory: the effect of it would be gone. For that plain and simple reason the Courts have always refused to enter into an inquiry of that sort."

LORD HERSCHELL. "The plaintiffs in this action, having sought an affidavit with regard to documents in the possession of the defendant, and having obtained a statement that he has certain documents in his possession, desire to put interrogatories to him upon them. The defendant, in relation to those documents, has stated on oath that they 'do not in any way tend to prove or to support the title' of the plaintiffs, and that they are deeds relating solely to his own title."

"It appears to me that *primâ facie* **this affidavit, according to the authorities, is absolutely sufficient.** . . . But assuming that there may be cases in which an interrogatory directed to a particular document would be admissible, there must be some special ground or reason shown why in the particular case the interrogatory ought to be permitted."

PICKERING v. NOYES
(1823).

1 L. J. K. B. 110; 1 B. & C. 262; 2 D. & R. 386; 28 R. R. 430.

A person who is not a party to the action cannot be compelled to produce his title deeds, or other documents referring to his title to property.

The Court therefore, on the application of the defendant, in an action brought to try the title to land, refused to compel the plaintiff or his landlord to permit the defendant to inspect or take a copy of one of the landlord's title deeds to his estate.

ABBOTT, C.J. "The present request is made, not in furtherance of a right, but with the intention of **looking into and examining another man's title to his estate. We should be much concerned if any authority could be found for such an application.** The Courts have gone quite far enough in these matters, but yet they have never made the order unless one party was clearly a trustee for the other."

R. v. GIBSON
(1887).

L. R. 18 Q. B. D. 537; 56 L. J. M. C. 49; 56 L. T. 367; 35 W. R. 411; 51 J. P. 742; 16 Cox, C. C. 181.

In a criminal trial, if any evidence be improperly admitted or rejected, and the prisoner is convicted, the conviction will be quashed, although there was other evidence sufficient to warrant a conviction.

LORD COLERIDGE, C.J. "Evidence was received of a statement by a passer-by which tended to the identification of the prisoner. It was admitted that the statement was not proved to have been made in the hearing of the prisoner. Therefore it was in itself not receivable in evidence. The counsel for the prisoner, in the exercise of

his discretion, did not object, and the evidence was admitted. The Chairman summed up to the jury, and he tells us that he did specifically leave to the jury this bit of evidence which ought not to have been received. After the jury had retired, the prisoner's counsel objected that that evidence ought not to have been left to the jury; but the Chairman refused to withdraw it from them. How far a technical withdrawal at that time would have been sufficient, it is not necessary now to say. **Therefore the verdict proceeded upon that which was not evidence. The question is whether such a conviction can stand.** If it had been a verdict in a civil action prior to the Judicature Acts, it certainly could not have stood, because the rule was that if any evidence, however slight, which was not legal evidence and might have affected the verdict, was received and went to the jury, a new trial was a matter of right, for the Courts said that they would not weigh evidence and could not say how the particular evidence might have affected the jury. It clearly cannot be said that at the time of the passing of the Judicature Acts there was any difference between a civil and criminal case as to the result of the finding of a jury arrived at upon evidence partly legal and partly not. No doubt the consequences were different; but in each case the verdict of the jury would have been set aside upon the ground that it proceeded upon some evidence which should not have been left to the jury. In a civil case, it is true, that might have been redressed by a second trial. In a criminal case there could not be a second trial. But in each case I am of opinion that the decision would have been vitiated by the admission of evidence part of which was legal and part illegal. Here it is clear that evidence was left to the jury which should not have been left to them. Therefore **I am of opinion that the conviction cannot stand. . . . A Judge in criminal cases must take care that the finding of the jury is not founded upon any evidence other than that which the law allows.**"

MATHEW, J. "We have to lay down a rule which shall apply, whether a prisoner is defended or undefended. In every case it is the **duty of the Judge** to tell the jury what is the law applicable to the case, and above all things **to warn them against acting upon that which is not evidence** against the prisoner. Here the jury were directed that that was evidence which was not evidence. I am, therefore, clearly of opinion that the conviction should be quashed."

WILLS, J. "The course taken by the prisoner's counsel has no bearing upon the question before us. If a mistake had been made by counsel, that would not relieve the Judge from his duty to see that only that which was proper evidence was before the jury. **The Judge must take care that the prisoner is not convicted upon any but legal evidence.** I am, therefore, of opinion that the conviction must be quashed."

Note.—The effect of misreception of evidence is not so serious in civil cases. Order 39, r. 6 of the Rules of the Supreme Court provides:—

"A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence . . . unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial."

This is one of the differences between the rules of evidence in criminal cases and those in civil cases. Other differences are:—

1. Stricter proof is required to prove crimes than civil claims. They must be proved beyond all reasonable doubt. Corroboration is more frequently required, as in treason (see *ante*, p. 92), and perjury (see *ante*, p. 93). In practice, the evidence of an accomplice is not sufficient to convict (see *ante*, p. 93).

2. A prisoner can always give evidence of his good character, which can be answered by evidence of his bad character (see *ante*, p. 72). In civil cases evidence of the plaintiff's character is only admissible when it is in issue (see *ante*, p. 70), or when damages depend on it (see *ante*, p. 71).

3. The rules as to the evidence of the parties themselves are somewhat different. In civil cases, the parties and their husbands and wives are both competent and compellable witnesses. In criminal cases, prisoners and their husbands and wives were, until 1898, generally incompetent. Now they are competent, but only with the prisoner's consent (Criminal Evidence Act, 1898).

4. Admissions made by the parties are freely admitted in civil cases (see *ante*, p. 102), but they are not generally allowed in criminal cases; and even confessions are not admitted unless they are proved to be quite voluntary (see *ante*, p. 110).

5. Depositions of absent witnesses are more readily available in criminal than in civil cases (see *ante*, p. 150). On the other hand, the evidence of witnesses abroad is more available in civil cases (Rules of the Supreme Court, Order 37, r. 5).

6. In civil proceedings unstamped documents cannot be given in evidence. In criminal proceedings they can be.

7. In trials for homicide, dying declarations are admitted (see *ante*, p. 142). In civil cases they never are.

(See, generally, Kenny, *Criminal Law*, Ch. XXVI.; Harris, *Criminal Law*, p. 454.)

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